SUPREME COURT OF THE UNITED STATES.

No. 454.

CHARLES G. MILLER, W. T. MILLER, ISAAC HILLS, LEVI A. WARD, VINCENT M. SMITH, ASAHEL O. COMSTOCK, DAVID R. MORSE, HENRY C. FISK, AND GILBERT CAMERON, PLAINTIFFS IN ERROR,

VS.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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1 To the Honorable Samuel Nelson, one of the justices of the Supreme Court of the United States:

The petition of Charles G. Miller, of the town of New Rochelle, and county of Westchester; William F. Miller, David R. Morse, Henry C. Fisk, and Gilbert Cameron, of the city of Buffalo, and county of Erie; Asahel O. Comstock, of the village of Le Roy, and county of Genesee; Levi A. Ward, Isaac Hills, and Vincent M. Smith, of the city of Rochester, and county of Monroe; all in the State of New York, respectfully shows—

That, on the thirteenth day of December, 1870, in a certain action then pending in the court of appeals of the State of New York, in which The People of the State of New York were plaintiffs, and your petitioners were defendants, wherein was drawn in question the validity of a statute of said State, being chapter 59 of the laws of 1867, on the ground of its being repugnant to the Constitution of the United States, a final judgment was rendered in favor of the plaintiffs aforesaid, and 2 against your petitioners, the defendants, the decision in which judgment was in favor of the validity of the said statute.

Wherefore your petitioners pray your honor to allow a writ of error to the said court of appeals of the State of New York, being the highest court of law or equity in said State in which a decision of the said action could be had, for the correction of the error aforesaid, and the reversal of the said judgment, according to the form of the statute in such case made and provided.

Dated December 15, 1870.

CHARLES G. MILLER.
WILLIAM F. MILLER,
DAVID R. MORSE,
HENRY C. FISK,
GILBERT CAMERON,
ASAHEL O. COMSTOCK,
LEVI A. WARD,
ISAAC HILL,
VINCENT M. SMITH,
Petitioners.
By THEODORE BACON,
Their Attorney.

3 The writ of error is allowed as prayed, to issue with citation, on filing bond with approved surety in the penalty of five thousand dollars.

Dated December , 1870.

4 (Indorsed:) U. S. Supreme Court. Charles G. Miller & others, plaintiffs in error, vs. The People of the State of New York, defendants in error. Petition for writ of error. Theodore Bacon, attorney for pl'ff's in error. Rochester, N. Y., Dec'r 16, 1870. Allowed. S. Nelson.

5 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the court of appeals of the State of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals before you,

or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of New York, plaintiffs, and Charles G. Miller, William F. Miller, Isaac Hills, Levi A. Ward, Vincent M. Smith, Asahel O. Comstock, David R. Morse, Henry C. Fisk, and Gilbert Cameron, defendants, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such its
6 validity, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon Portland Chase, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and seventy.

Issued 16 December, 1870.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

S. NELSON,
Asso. Jus. Sup. C't U. S.

7 (Indorsed:) U. S. Supreme Court. Charles G. Miller et al., plaintiffs in error, vs. The People of the State of New York, defendants in error. Writ of error. Theodore Bacon, attorney for pl'ffs in error, Rochester, N. Y.

8 Supreme Court of the United States.

Know all men by these presents that we, Charles G. Miller, of the town of New Rochelle, county of Westchester, and State of New York; Jay Gould, of the city, county, and State of New York; & James Fisk, jr., of the city, county, and State of New York, are held and firmly bound to The People of the State of New York, in the sum of five thousand dollars, to be paid to the said people of the State of New York; to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this fourteenth day of December, in the year one thousand eight hundred and seventy.

Whereas the above-named Charles G. Miller, with Isaac Hills, Levi A. Ward, & Vincent M. Smith, of the city of Rochester, and county of Monroe; William F. Miller, David R. Morse, Henry C. Fisk, and Gilbert Cameron, of the city of Buffalo, and county of Erie; and
9 Asahel O. Comstock, of the village of Le Roy, in the county of Genessee, all in the State aforesaid, have prosecuted a writ of error from the Supreme Court of the United States to reverse the

judgment rendered by the court of appeals of the State of New York in a certain cause in which the said The People of the State of New York were plaintiffs, and the said Charles G. Miller, Isaac Hills, Levi A. Ward, Vincent M. Smith, William F. Miller, David R. Morse, Henry C. Fisk, Gilbert Cameron, and Asahel O. Comstock were defendants:

Now, therefore, the condition of this obligation is such, that if the above-bounden Charles G. Miller and the said Isaac Hills, Levi A. Ward, Vincent M. Smith, William F. Miller, David R. Morse, Henry C. Fisk, Gilbert Cameron, and Asahel O. Comstock shall prosecute their said writ error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

C. G. MILLER. [L. S.]
JAY GOULD. [L. S.]
JAMES FISK, JR. [L. S.]

Sealed and delivered in presence of—
MORTIMER SMITH.

10 CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

On this 14th day of December, 1870, before me personally appeared Charles G. Miller, Jay Gould, and James Fisk, jr., to me known to be the same persons described in and who executed the foregoing instrument, and severally acknowledged that they executed the same.

[L. S.] MORTIMER SMITH,
Notary Public, N. Y.

CITY, COUNTY, & STATE OF NEW YORK, *ss:*

Charles G. Miller, Jay Gould, & James Fisk, jr., being severally duly sworn, each for himself says: I am a resident and freeholder of the State of New York, and am worth in property, not exempt from execution, ten thousand dollars, over and above all debts and liabilities which I owe or have incurred.

C. G. MILLER.
JAY GOULD.
JAMES FISK, JR.

Subscribed & sworn this 14th day of December, 1870, before me.
[L. S.] MORTIMER SMITH,
Notary Public, N. Y.

STATE OF NEW YORK,
City & County of New York, ss:

I, Charles E. Loew, clerk or the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that Mortimer Smith, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county, the 14 day of Dec., 1870.

CHA'S E. LOEW, *Clerk.* [L. S.]

[5-cent revenue stamp.]

11 The United States of America to The People of the State of New York, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the court of appeals of the State of New York, wherein Charles G. Miller, William F. Miller, David R. Morse, Henry C. Fisk, Gilbert Cameron, Asahel O. Comstock, Isaac Hills, Levi A. Ward, and Vincent M. Smith are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Nelson, one of the justices of the Supreme Court of the United States this sixteenth day of December, in the year of our Lord one thousand eight hundred and seventy.

S. NELSON,
Asso. Jus. Sup. C't U. S.

12 STATE OF NEW YORK,
Albany City and County, ss:

On this 21st day of December, in the year of our Lord one thousand eight hundred and seventy, personally appeared Charles W. Reynolds before me, the subscriber, a notary public in and for said county, and makes oath that he deliverd a true copy of the within citation to the Honorable John T. Hoffman, governor of the State of New York, and the Hon. M. B. Champlain, attorney general of said State, at the city aforesaid, on the 21st day of December, 1870; at the same time showing each of them the within, and calling their attention to the signature of the justice thereon.

CHARLES W. REYNOLDS.

Sworn to and subscribed the 21st day of December, A. D. 1870.
[SEAL.] ROBERT T. SHERMAN,
Notary Public, Albany County, New York.

STATE OF NEW YORK,
City and County of Albany, Clerk's Office, ss:

I, John McEwen, clerk of the said city and county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that Robert T. Sherman, whose name is subscribed to the jurat of the annexed affidavit, was, on the day of the date thereof, a notary public, in and for the county of Albany, dwelling in said county, duly authorized to administer oaths for general purposes, and that I am well acquainted with the handwriting of the said notary public, and verily believe that the signature to the said jurat is genuine.

In testimony whereof I have hereunto set my hand and affixed my official seal this 21st day of December, 1870.

[SEAL.] JOHN McEWEN, *Clerk.*

[Five-cent internal revenue stamp affixed and canceled.]

(Indorsed:) U. S. Supreme Court. Charles G. Miller et al., plaintiffs in error, vs. The People of the State of New York, defendants in error. Citation. Theodore Bacon, attorney for pl'ffs in error, Rochester, N. Y. (Original.)

13 In court of appeals.

Supreme court, county of Monroe.

THE PEOPLE OF THE STATE OF NEW YORK, AND Daniel W. Powers, Edward R. Hammatt, Amon Bronson, Abram Karnes, Joseph H. Pool, Edward A. Raymond and Chauncey Perry,

against

THE ROCHESTER & GENESEE VALLEY RAILroad Company, Charles G. Miller, William F. Miller, Isaac Hills, Levi A. Ward, Vincent M. Smith, Asahel O. Comstock, David R. Morse, Henry C. Fisk and Gilbert Cameron.

Summons.

To the above-named defendants:

You are hereby summoned to answer the complaint of the above-named plaintiffs, a copy of which will be filed in the office of the clerk of Monroe County, at Rochester, N. Y., and to serve a copy of your answer on the subscriber, at his office at Albany, within twenty days after the service of this summons, exclusive of the day of service, or the plaintiffs will apply to the court for the relief demanded in the complaint.

M. C. CHAMPLAIN,
Plffs' Att'y, & Att'y Gen. State of New York.

Served May 27, 1869.

C. GILLS.

14 Supreme court, Monroe County.

THE PEOPLE OF THE STATE OF NEW YORK, and Daniel W. Powers, Edward R. Hammatt, Amon Bronson, Abram Karnes, Joseph H. Pool, Edward A. Raymond, and Chauncey Perry,

against

THE ROCHESTER AND GENESEE VALLEY RAILroad Company, Charles G. Miller, William F. Miller, Isaac Hills, Levi A. Ward, Vincent M. Smith, Asahel O. Comstock, David R. Morse, Henry C. Fisk and Gilbert Cameron.

The plaintiffs in the above entitled action, for complaint against the defendants therein, say that the Rochester and Genesee Valley Railroad is a railroad corporation within the State of New York, and created under and by virtue of the general railroad act, passed April 2, 1850, and that its articles of association were filed in the office of the secretary of state, July 10, 1851; that its business affairs are controlled by a board of thirteen directors, who are annually elected by the stockholders of the said corporation; that such board of directors are by law, among other things, duly authorized to appoint one of their number as president, and also to appoint a secretary and treasurer. That the city of Rochester is the owner of three hundred thousand dollars of the paid-up capital stock of the said corporation, being a majority of the paid-up capital stock thereof, and by law the said city, by its common council, is entitled to elect seven of the directors of the said board, and the balance of the capital stock to elect the residue; that the said city, by its common council, duly elected the plaintiffs, except the plaintiff The People of the State of New York, directors for the said board and for said corporation for the year commencing in the month of June, 1868.

And said plaintiffs further say that a meeting of the stock-
15 holders of said Rochester & Genesee Valley Railroad Company,
other than the city of Rochester, was held at the office of said company on the second Thursday of June, 1868, at which a portion of the said stockholders assembled to elect as directors of said company the defendants Charles G. Miller, William F. Miller, Isaac Hills, Levi A. Ward, Vincent M. Smith, Asahel O. Comstock, David R. Morse, Henry C. Fisk and Gilbert Cameron. That at such election the names of each and all of the said defendants were voted upon one ballot, and each and all of said defendants were voted for in that manner, upon and by the holder of each share of stock of said corporation, as is hereinafter more fully stated.

That immediately after such election the defendants, Charles G. Miller, William F. Miller, Isaac Hills, Levi A. Ward, Vincent M. Smith, Asahel O: Comstock, David R. Morse, Henry C. Fisk, and Gilbert Cameron, without any legal authority, right, or warrant whatsoever, entered upon, used, and exercised the said offices of directors of said corporation, and still do hold, use, and exercise the same within the State of New York, to wit, at the city of Rochester, and since that day, and without any legal warrant or authority, have claimed and received and enjoyed all the rights, franchises, fees, and emoluments belonging or appertaining to the said offices; which rights and franchises the defendants have usurped and unlawfully held and exercised, and still do unlawfully hold and exercise within the State of New York, to the damage of the people thereof.

And said plaintiffs further say, that the said defendants, the said directors, have unlawfully taken possession of all the books, papers, and funds of said corporation, and now have the possession and control thereof, either personally or by or through the agency of the said defendant, Isaac Hills, who they have unlawfully assumed to elect to the office of secretary and treasurer of said corporation; and that the said
pretended directors refuse to recognize the right of the plaintiffs,
16 other than the people aforesaid, to act as directors of the said
corporation, and wholly exclude them from all rights and privileges belonging or appertaining to said office.

And said plaintiffs further say, that the railroad constructed by the said corporation extends from the city of Rochester, in the county of Monroe, to the village of Avon, in the county of Livingston, and that the office of said corporation has been, ever since its organization, hitherto kept at the said city of Rochester, and its books and papers kept at said office, and that the funds of the said corporation have been, during the time aforesaid, kept by the secretary and treasurer at the city aforesaid.

And said plaintiffs further say, that at the election for directors of the said corporation held by the stockholders thereof, other than the city of Rochester, fifteen hundred shares of the stock of said corporation were voted upon by one Charles G. Miller, the said fifteen hundred shares being a majority of all the stock of said corporation, other than that held by the city of Rochester; that the vote cast upon said fifteen hundred shares by said Miller was cast for the said defendants, the said pretended directors, and were all counted for them; and that except they had been so counted, the said defendants would not have had a majority of the votes cast at said election, but that other persons would have had such majority.

And said plaintiffs further say, that the said Charles G. Miller was not entitled to vote upon the said fifteen hundred shares, and that his vote in that behalf was not legal and competent, for the reason that, as they are informed and believe, the said Miller was not the owner of said stock in his own right, and the said stock was not held by said Miller, as trustee, under any valid trust, but on the contrary thereof, the said stock was held by said Miller in trust for the Erie Railway Company, or the Buffalo, New York & Erie Railroad Company, or for both of them, the
said companies, or one of them, having attempted to purchase the
17 said stock, which purchase is in contrariation of the statute in
such case made and provided, and which purchase is therefore
void, and said Miller has no title to the same.

And the said plaintiffs further say, that at the said annual election for the directors of the said corporation held by the stockholders thereof other than the city of Rochester, the vote of the said Charles G. Miller was duly objected to, and challenged for the reasons hereinbefore stated, and that the facts hereinbefore stated were duly offered to be proved before the inspectors of said election, and they were requested to give an opportunity to prove the same, and then and there to hear the proof thereof; but that the said inspectors of election disregarded said objection and challenge, and refused to hear said proof, and received and counted the vote of the said Charles G. Miller, notwithstanding the same.

And said plaintiffs further say, that they are informed and believe that the said defendants, the said pretended directors, are about to remove the books, papers, office, and funds of the said company from the city of Rochester to the city of New York, and to enter into some arrangement or agreement with the Erie Railway Company by which the rights and interests of the stockholders of the said Rochester & Genesee Valley Railroad Company, and especially the said city of Rochester, will be greatly injured and impaired.

Wherefore the plaintiffs pray that it may be established and adjudged by this court that the said defendants, Charles G. Miller, William F. Miller, Isaac Hills, Levi A. Ward, Vincent M. Smith, Asahel O. Comstock, David R. Morse, Henry C. Fisk, and Gilbert Cameron, and each of them, have usurped and unlawfully held and exercised the office of directors of the said Rochester & Genesee Valley Railroad Company, and the rights and franchises appertaining thereto, since the
day of June, 1868, and still do so unlawfully hold and exercise the
18 same, and that they, and each of them, be ousted and removed
therefrom, and that they pay the plaintiffs' damages of such unlawful usurpation. And the further judgment that the said plaintiffs, other than The People of the State of New York, are, and each of them is, entitled to the said offices and the rights, franchises, and fees thereof, and have, and each of them has, been so entitled since the said day of June, 1868.

And that the said defendants, and each of them, be enjoined from removing the office and the books, papers, and funds of the said Rochester & Genesee Valley Railroad Company from the city of Rochester aforesaid, or from intermeddling with the said funds further than as is necessary to defray the current expenses of the said company, and from entering into any permanent arrangement or agreement with the Erie Railway Company until the judgment of the court upon the right of the said defendants, and for such other or further or different relief as the court may see fit to grant, together with the costs of this action.

M. B. CHAMPLAIN,
Pl'ffs' Att'y & Att'y Gen.

MONROE COUNTY, *ss:*

Daniel W. Powers, being sworn, says he is one of the plaintiffs in the above-entitled action; that the foregoing complaint is true of his own knowledge, except as to the matters stated upon information and belief, and as to those he believes it to be true.

D. W. POWERS.

Sworn to before me May 12th, 1868.

J. B. PERKINS,
Notary Public.

19 Supreme court.

THE PEOPLE OF THE STATE OF NEW YORK, and Daniel W. Powers, Edward R. Hammatt, Amon Bronson, Abram Karnes, Joseph H. Pool, Edward A. Raymond, and Chauncey Perry,

against

THE ROCHESTER & GENESEE VALLEY RAILROAD, sued with Charles G. Miller and others.

The defendant The Rochester & Genesee Valley Railroad separately demurs to the complaint, upon the grounds:

I. That several causes of action have been improperly united, to wit:

A cause of action for usurping an office or offices; and

A cause of action for an injunction.

II. That as against this defendant, the complaint does not state facts sufficient to constitute a cause of action.

Dated June 22d, 1869.

THEODORE BACON,
Def't's Att'y.

Supreme court.

THE PEOPLE OF THE STATE OF NEW YORK. and Daniel W. Powers, Edward R. Hammatt, Amon Bronson, Abram Karnes, Joseph H. Pool, Edward A. Raymond and Chauncey Perry,

against

CHARLES G. MILLER, WILLIAM F. MILLER, Isaac Hills, Levi, A. Ward, Vincent M. Smith, Asahel O. Comstock, David R. Morse, Henry C. Fisk, and Gilbert Cameron, sued with The Rochester & Genesee Valley Railroad.

The defendants above-named other than The Rochester & Genesee Valley Railroad answer jointly as follows:

20 They admit that the Rochester & Genesee Valley Railroad is a railroad corporation created as alleged in the complaint; that its articles of association were filed as therein stated; that its business affairs are controlled by a board of thirteen directors, of whom four are

annually nominated and appointed by the common council of the city of Rochester, and nine are annually elected by the stockholders other than said city; that said board is by law authorized to appoint a president, secretary, and treasurer as therein alleged; and that the city of Rochester is the owner of $300,000 of the paid-up capital stock of said company, being a majority thereof.

These defendants deny that said city is entitled to elect seven of said directors, and allege that the common council, and by the terms of the contract whereby said city agreed to become a stockholder in said company, and said company agreed to receive said city as such stockholder, if said city has power by law to nominate and appoint one director and no more of said company, for every seventy-five thousand dollars of capital stock held by said city at the time of each election of directors, and has no voice in the election of the remaining directors.

These defendants have no knowledge or information sufficient to form a belief, whether any of the plaintiffs were duly elected directors of said company for the year commencing in June, 1868.

These defendants admit that a meeting of stockholders was held as alleged in the complaint on the second Thursday in June, 1868; and they allege that such meeting was the regular meeting for the election of directors, duly warned and held, and that at such meeting these defendants were duly elected directors for the ensuing year.

These defendants have no knowledge or information sufficient to form a belief, whether the names of these defendants were voted upon one ballot by all the stockholders as in the complaint mentioned, or by which, or how many of them said names were so voted.

21 These defendants admit that, immediately after such election, they entered upon, used, and exercised, and up to the time of commencing this action they continued to use and exercise, the offices of directors aforesaid, and allege that they did the same by good right and lawful authority, as aforesaid; and in like manner they admit that they took, and at the time of commencing this action continued to hold possession of, the books, papers, and funds of said corporation, and allege that they did the same by good right and lawful authority, as aforesaid.

These defendants deny that they have refused to recognize as directors, or excluded from the rights or privileges belonging to said office, the plaintiffs Amon Bronson or Edward R. Hammatt; but admit that they have so refused to recognize, and excluded the rest of said plaintiffs, and allege that they did so by good right and lawful authority, and in discharge of their duties as such directors. These defendants admit that, at the election aforesaid, fifteen hundred shares of the capital stock of said company were voted upon by this defendant Miller, as charged in the complaint; but they have no knowledge or information sufficient to form a belief whether these defendants or other persons would have had a majority of the votes cast at said election, except said vote had been counted as alleged.

These defendants further say that, as they are informed and believe, said Miller was entitled to vote upon said shares, and that his vote in that behalf was legal and competent; that said stock was not purchased or held in contravention of any statute or law, but was legally held by said Miller; and they have no knowledge or information sufficient to form a belief as to any of the allegations of the complaint in regard to the objecting to said vote and challenging the same, offers of proof to the inspectors, and refusal of the inspectors; but admit that said inspectors, as they were in duty bound to do, received and counted said vote.

22 These defendants further deny all the allegations of the complaint in regard to the intentions of these directors to remove books, papers, or office, or to enter into any arrangement or agreement of the sort or to the effect therein mentioned.

These defendants further say that, as they are informed and believe, none of the plaintiffs except Amon Bronson, Edward R. Hammatt, and Abram Karnes was a stockholder in said company, or qualified to vote for directors at the election in said complaint mentioned, or permitted to be a director in said railroad company by the statute in such case made and provided.

These defendants further say that, by an act of the legislature of this State, entitled "An act to amend an act entitled 'An act to amend and consolidate the several acts relating to the city of Rochester,' passed April 10th, 1850,'" which latest amendatory act was passed July 3d, 1851, and by certain proceedings of the electors of the said city of Rochester under said act, the common council of said city of Rochester were authorized to borrow the sum of three hundred thousand dollars, and to invest the same in the stock of said railroad company, and for the purpose, in the corporate name of the said city, to subscribe for or purchase stock of the said company, to the amount of said sum; and it was also enacted that, by virtue of said subscription or purchase of said stock, and upon receiving certificates or the transfer of certificates for the amount of said stock so subscribed for or purchased by them, the said city should acquire all the rights and privileges, and be liable to the same responsibilities as other stockholders of said company, except as in said act afterward mentioned.

That, by section two hundred and ninety of said act, it was provided that the common council aforesaid, in case the said railroad company should elect to receive their subscription, should have power to nominate and appoint one director of said company for every seventy-
23 five thousand dollars of capital stock held by said city at the
time of each election of directors of said company, but that said city should have no voice in the election of the remaining directors.

That, thereafter, and before the closing of subscriptions to the capital stock of said company, the said common council, in the corporate name of the said city, in pursuance of said amended act, did subscribe for stock of the said company to the amount of three hundred thousand dollars; that the said company did thereupon duly elect to receive said subscription, under the conditions so as aforesaid prescribed by said act, and not otherwise; that certificates were thereupon duly issued to and received by the said city for the amount of said stock so as aforesaid subscribed for by it; and that thereupon the common council of the said city, in pursuance of the terms of the said act, and of the contract entered into under the authority and by virtue of the provisions of the said act, by and between the said city of Rochester, of the one part, and the said Rochester and Genesee Valley Railroad Company, of the other part, as above set forth, became entitled to nominate and appoint one director of said company for every seventy-five thousand dollars of capital stock held by said city at the time of each election of directors of said company; but said city had and was entitled to have no voice in the election of the remaining directors.

These defendants further say that, at every annual election of directors thereafter until the annual election in the year 1865, the said common council did nominate and appoint four of the directors of said railroad company, being one for every seventy-five thousand dollars of its capital stock held by said city at the times of such elections, but had not, nor pretended to have, any voice in the election of the remaining nine directors who were elected by the holders of the residue of said capital stock.

24 These defendants further say that, on the 9th day of March, 1867, the legislature of this State passed an act entitled, "An act to amend section 290, chapter 389, of the laws of 1851, relating to the election of directors for the Rochester and Genesee Valley Railroad Company by the common council of the city of Rochester," whereby it was enacted that said section 290 was amended so that the common council of said city should have the power to nominate and appoint one director of said railroad company for every forty-two thousand eight hundred and fifty-five dollars and five-sevenths of a dollar of said capital stock, instead of one director for every seventy-five thousand dollars thereof held by said city at the time of each election as aforesaid; but these defendants insist that such amendatory act, if it should be held valid, would impair and annual the obligation of the contract entered into as aforesaid, by and between the said city of Rochester, of the one part, and the said Rochester and Genesee Valley Railroad Company, of the other part, and is therefore in conflict with section ten of article one of the Constitution of the United States, and is null and void; and the plaintiffs other than The People of the State of New York, claim to be entitled to said offices of directors, as these defendants are informed and *by* believe, solely by virtue of some appointment or election thereto by the common council of said city, under the pretended authority of said unconstitutional act, and not otherwise.

Dated June 22d, 1869.

THEODORE BACON,
Defendants' Attorney, Rochester.

25 MONROE COUNTY, *ss:*

David R. Morse and Gilbert Cameron, of the city of Buffalo, being duly sworn, each for himself, says: I am one of the defendants in this action; I have heard read the foregoing answer, and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated on information and belief, and as to those matters I believe the same to be true.

D. R. MORSE.
G. CAMERON.

Sworn before me this 10th day of July, 1869.

JNO. H. ROCHESTER,
Notary Public.

Supreme court.

THE PEOPLE OF THE STATE OF NEW YORK, and Daniel W. Powers, Edward R. Hammatt, Amon Bronson, Abram Karnes, Joseph H. Pool, Edward A. Raymond and Chauncey Perry,

against

THE ROCHESTER & GENESEE VALLEY RAILroad Company, Charles G. Miller, William F. Miller, Isaac Hills, Levi A. Ward, Vincent M. Smith, Asahel O. Comstock, David R. Morse, Henry C. Fisk, and Gilbert Cameron.

This action having been brought to trial before me, without a jury,

at a special term and circuit, held at the court-house in Rochester, in and for the county of Monroe, on the 4th day of November, 1869, I do find and decide as follows:

As matters of fact:

That the Rochester & Genesee Valley Railroad is a corporation organized under and by virtue of the general railroad act, passed April 2d, 1850, and that its articles of association were filed in the office of the Secretary of State, July 10, 1851.

26 That the whole amount of stock subscribed for the said corporation was 9,775 shares of one hundred dollars each. That the total amount of full-paid stock, and for which certificates have been issued, is 5,552 shares of one hundred dollars each.

That on the 15th day of June, 1852, the mayor of the city of Rochester, by authority and in behalf of the common council of said city, by virtue of the act mentioned in the answer, passed July 3d, 1851, and in accordance with the terms and conditions of said act, subscribed for three hundred thousand dollars of the stock of said corporation, being three thousand shares of one hundred each.

That thereupon and upon the same day, the said railroad company, by resolution of its board of directors, and in view of the terms and conditions of said act, elected to receive said subscription.

That said stock was fully paid in, and certificates issued therefor; and that the said city has been ever since, and was at the commencement of this action, the holder and owner thereof, and that the said railroad company has continued to exercise its corporate functions to the present time.

That thereafter, and until the annual election of directors in 1865, the said city, by its common council, at the time of each annual election, and in accordance with the terms of said act, elected four out of the thirteen directors, and that the remaining stockholders of said company elected nine out of said thirteen, without interference from said city.

That on the 11th of June, 1868, at the regular annual meeting of the stockholders, the stockholders of said company met and in form elected the following nine persons as directors for the ensuing year: Charles G. Miller, William F. Miller, Isaac Hills, Levi A. Ward, Vincent M. Smith, Asahel O. Comstock, David R. Morse, Henry C. Fisk and Gilbert Cameron.

27 That on the same day the common council of said city, by virtue of the act of March 9th, 1867, mentioned in the answer, elected the following-named seven persons directors of said company: Daniel W. Powers, Edward R. Hammatt, Amon Bronson, Abram Karnes, Joseph H. Pool, Edward A. Raymond, and Chauncey Perry.

I do further find that the whole amount of capital stock of said company subscribed was as follows:

By the city of Rochester	$300,000
" all other parties	677,500
Total amount	$977,500

That the whole amount of capital stock paid up, and for which scrip has been issued, is as follows:

By the city of Rochester	$300,000
" all other parties	255,200
Total amount	$555,200

That the whole number of shares of capital stock, at $100 per share, now issued, is as follows:

To the city of Rochester	3,060
" all other parties	2,522
Total number	5,552

And that the balance of the shares of said stock is not in existence, the same having been extinguished or forfeited before the act of March 9, 1867.

That the Rochester & Genesee Valley Railroad Company, long prior to the act of March 9, 1867, had abandoned the construction of their road south of Avon, and assigned all their right of way, property, and franchises beyond that point to another corporation.

That the road as in fact constructed, and now operated by the company, terminates at Avon, and is only 18¾ miles in length.

And I further find and decide as matter of law—

28 That the act of March 9th, 1867, authorizing the city of Rochester to elect seven directors of said railroad company instead of five, is constitutional and valid.

That the election of the defendants as directors of said company was invalid.

That the plaintiffs, The People of the State of New York, are entitled to judgment; that the defendants aforesaid have usurped and unlawfully held and exercised the offices of directors of the Rochester & Genesee Valley Railroad, and did unlawfully hold and exercise the same at the time of the commencement of this action; and for their costs.

And the issue of law herein raised by the demurrer of the defendants, The Rochester & Genesee Valley Railroad, to the complaint, having been separately tried before me at the same time, I do further find and decide that the defendant aforesaid is entitled to judgment upon said demurrer for a dismissal of the complaint, with costs.

THOMAS A. JOHNSON,
Justice Supreme Court.

Supreme court.

THE PEOPLE OF THE STATE OF NEW YORK, and Daniel W. Powers, Edward R. Hammatt, Amon Bronson, Abram Karnes, Joseph H. Pool, Edward A. Raymond, and Chauncey Perry,

against

THE ROCHESTER & GENESEE VALLEY RAILroad Company, Charles G. Miller, William F. Miller, Isaac Hills, Levi A. Ward, Vincent M. Smith, Asahel O. Comstock, Henry C. Fisk, David R. Morse, and Gilbert Cameron.

This action having been brought to trial at a special term and circuit, held at the court-house, in Rochester, in and for the county of Monroe, on the 4th day of November, 1869, and the judge having made and filed his decision therein:

29 Now, therefore, it is ordered and adjudged that the defendants, Charles G. Miller, William F. Miller, Isaac Hills, Levi A. Ward,

Vincent M. Smith, Asahel O. Comstock, David R. Morse, Henry C. Fisk, and Gilbert Cameron have usurped and unlawfully held and exercised the offices of directors of the Rochester & Genesee Valley Railroad Company, and did unlawfully hold and exercise the same at the time of the commencement of this action.

And it is further ordered and adjudged that the plaintiffs, The People of the State of New York, do recover of the defendants aforesaid, eighty-six dollars and nine cents as and for their costs in this action.

And upon the issue of law joined in said action by the demurrer of the defendant, the Rochester & Genesee Valley Railroad Company, to the complaint therein, it is ordered and adjudged that said demurrer is sustained, and that the complaint as against the defendant aforesaid be dismissed, and that said defendant recover of the plaintiffs, other than The People of the State of New York, forty-six dollars and sixty cents, as and for their costs in this action.

J. M. BARDWELL,
Ass't Dep'y Clerk.

Supreme court.

THE PEOPLE OF THE STATE OF NEW YORK,
Daniel W. Powers, and others,
ag'st
CHARLES G. MILLER AND OTHERS, SUED WITH
The Rochester & Genesee Valley Railroad
Company.

This action was commenced on the 14th day of May, 1869, and the issues therein were brought to trial at an adjourned circuit court, before the Honorable Thomas A. Johnson, justice, at the city of Rochester, on the 4th day of November, 1869.

30 The plaintiffs, to maintain the issues, read in evidence the articles of association of the Rochester and Genesee Valley Railroad, dated June 9th, 1851, and filed in the office of the secretary of state, on the 10th day of July, 1851, as follows:

Articles of Association of the Rochester and Genesee Valley Railroad.

Know all men by these presents that the undersigned, being subscribers to the stock of the contemplated railroad from Rochester to the town of Portage, Livingston County, to at least one thousand dollars per mile of the railroad intended to be built, and which said stock has, by them, been subscribed in good faith, and ten per cent. paid thereon, and being desirous of forming a corporation for that purpose, do hereby adopt articles of association, as follows, to wit:

We, the undersigned, whose names are hereunto subscribed, hereby organize, form, and become a corporation and body corporate, under and in pursuance of an act entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April 2d, 1850, for the purpose of constructing, owning, and maintaining a railroad from Rochester to said town of Portage, said corporation to be known by the name and style of Rochester and Genesee Valley Railroad, to continue for the term of two hundred years from the day of the date hereof. The capital stock of said corporation shall be, and is, hereby fixed at eight hundred thousand dollars, (800,000,) and shall consist of, and be divided into eight thousand shares of one hundred dollars each.

The said railroad shall be constructed from Rochester to said Portage, the length of the said road to be, as near as the same can now be estimated, fifty miles, and the same to be constructed through or into
31 the counties of Monroe and Livingston. The number of directors to manage the concerns of said corporation, shall be and is hereby fixed at thirteen; and the names of the persons who have been selected to act as directors of such corporation, and to hold their offices until others are elected, are as follows:

Calvin B. Lawrence, Charles H. Carroll, James S. Wadsworth, John Vernam, William T. Cuyler, Daniel H. Fitzhugh, Allen Ayrault, Elijah F. Smith, William Pitkin, Azariah Boody, Amon Bronson, Levi A. Ward, and Freeman Clarke.

In witness whereof we have severally hereunto subscribed our names, places of residence, and number of shares of stock we have respectively ageed to take in said company, this 7th day of June, in the year of our Lord one thousand eight hundred and fifty-one.

Names.	No. of shares.	Residence.	
A. Boody	200	Rochester	$20,000
F. Clarke	100	do	10,000
A. Bronson	50	do	5,000
Smith & Perkins	50	do	5,000
J. W. Bissell	50	do	5,000
E. S Coffran	15	do	1,500
William Alling	10	do	1,000
E. Wolcott	10	do	1,000
George S. Riley	50	do	5,000
H. E. Hooker	10	do	1,000
H. E. Rochester	20	do	2,000
W. A. & M. F. Reynolds	50	do	5,000
William Kidd	20	do	2,000
L. A. Ward	20	do	2,000
H. A. Forsyth	10	do	1,000
William Pitkin	20	do	2,000
Ebenezer Ely	10	do	1,000
G. H. Mumford	5	do	500
A. J. Brackett	5	do	500
32 Wilder, Gorton & Co	10	Rochester	1,000
Fairbanks, Eldridge & Co	10	do	1,000
John M. French	5	do	500
G. H. Perkins	2	do	200
W'm H. Ritter	2	do	200
James C. Marsh	5	do	500

STATE OF NEW YORK, *Monroe Co., ss:*

Azariah Boody, Amon Bronson, and Levi A. Ward, three of the directors of the Rochester and Genesee Valley Railroad Company, being each duly sworn, do severally depose and say, that sixty thousand dollars of the capital stock of said company has in good faith been subscribed, and that ten per cent. of the amount of such subscription has been actually paid in by the subscribers in cash and bank checks accepted by the bank holding the deposits as cash. Further these deponents say not.

AZARIAH BOODY.
AMON BRONSON.
L. A. WARD.

Sworn this first day of June, 1851, before me.

J. B. BENNETT,
Commissioner of Deeds.

STATE OF NEW YORK, *Office of the Secretary of State:*

I have compared the preceding with the original articles of association of the Rochester and Genesee Valley Railroad, with acknowledgment thereto annexed, filed and recorded in this office on the 10th day of July, 1851, and hereby certify the same to be a correct transcript therefrom, and of the whole of said original.

Witness my hand and seal of office of the secretary of state, at the city of Albany, this 13th day of January, one thousand eight hundred and sixty-six.

[L. S.] ERASTUS CLARK,
Deputy Secretary of State.

33 The following facts and circumstances were admitted by the defendants' counsel, and duly received in evidence; that the whole amount of capital stock of said company subscribed was as follows:

By the city of Rochester	$300,000
By all other parties	677,500
Total amount	$977,500

That the whole amount of capital stock paid up and for which scrip has been issued, is as follows:

By the city of Rochester	$300,000
By all other parties	255,200
	$555,200

That the whole number of shares of capital stock, at $100 per share, now issued, is as follows:

To the city of Rochester	3,000
To all other parties	2,552
Total number	5,552

And that the balance of the shares of said stock is not in existence, the same having been extinguished or forfeited before the act of March 9, 1867.

That the Rochester and Genesee Valley Railroad Company had, long prior to the act of March 9th, 1867, abandoned the construction of their road south of Avon, and assigned all their right of way, property, and franchises beyond that point to another corporation.

That the road as in fact constructed, and now operated by the company, terminates at Avon, and is only 18¾ miles in length.

That on the 11th of June, 1868, the city of Rochester was and still is the owner of $300,000 or 3,000 shares of the capital stock of said company.

That the common council of the city of Rochester, on the 11th of
June, 1868, assumed to elect or appoint the plaintiffs, Amon Bron-
34 son, E. R. Hammatt, Joseph H. Pool, D. W. Powers, Chauncey
Perry, Abram Karnes, and Edward A. Raymond, as directors of
the Rochester and Genesee Valley Railroad Company.

The first, third, and fifth articles of the by-laws of the company were read in evidence, as follows:

ARTICLE I.

The election of directors shall be held annually at the office of the company, in the city of Rochester, on the second Thursday of June in each year, the polls to be opened at two o'clock in the afternoon, and continue open for two hours.

Public notice of every such election shall be given by the secretary in two of the public newspapers, published in each of the counties of Monroe and Livingston, once in each week, for two weeks prior thereto.

Every such election shall be held under the inspection of three inspectors, who shall be previously appointed by the board of directors.

All elections of directors shall be by ballot. The inspectors shall make a certificate of the whole number of votes received, and declaring who are the persons elected as directors for the ensuing year, which certificate shall be recorded in the minutes of the company, and placed on file.

ARTICLE III.

The officers of the company to be appointed by the board of directors, shall consist of a president, vice president, treasurer, secretary, and superintendent, together with such number of engineers and other subordinate officers and agents as the directors shall, from time to time, think proper to appoint.

The president, vice president, and standing committees of the company shall be appointed annually, at the first meeting of the board of directors, after their election, and shall hold their office for one year, or until others are appointed in their places; all other officers or
35 agents of the company shall hold their respective places during the pleasure of the board of directors.

Any vacancies in said office happening by death, resignation, or otherwise shall be filled by the board of directors at their first meeting after such vacancies shall happen; and until the board of directors shall fill such vacancy the duties of the offices shall be discharged by some person to be designated by the executive committee.

ARTICLE V.

The president shall have power to call meetings of the board of directors at such times and places as he shall think proper to appoint, and it shall be his duty to call such meetings of the board when requested to do so in writing by any two of the directors of the company.

He shall preside at all meetings of the board of directors when present, and in his absence and the absence of the vice-president, the board shall appoint a chairman pro tempore.

It shall be the duty of the president also to exercise a general supervision over all the interests and affairs of the company, and he shall possess the powers usually exercised by the presiding officer of incorporated companies.

It was also admitted and received in evidence that all necessary steps and proceedings had been taken to authorize the city of Rochester to subscribe for and receive the said stock.

And that the said railroad company has continued to exercise its corporate functions to the present time.

The proceedings of the board of directors on the 15th day of June, 1852, were here read in evidence, as follows:

At a meeting of the directors, held agreeable to adjournment, June 15th, 1852:

* * * * * * * *

36 A committee on the part and behalf of the common council of the city of Rochester attended the board, and presented the following paper on behalf of the corporation of said city, viz:

"In Common Council *June 14th*, 1852.

"*Special meeting.*

"By Alderman Smith:

"*Resolved*, That the common council of the city of Rochester will borrow on the faith and credit of said city the sum of $300,000, and for that purpose will execute bonds therefor under their corporate seal and the signature of his honor the mayor; such bonds to be payable in twenty years, and to bear an interest not exceeding seven per cent. per annum.

"*Resolved*, That his honor the mayor be, and he is hereby, authorized and directed, in the corporate name of this city, to subscribe for the stock of the Rochester and Genesee Valley Railroad Company to the amount of three hundred thousand dollars.

A true copy from the minutes.

"WASHINGTON GIBBONS, *Clerk.*"

"In pursuance of the second above resolution, and by virtue of the authority thereby conferred upon me, I, Hamlin Stilwell, mayor of the city of Rochester, and in the corporate name of said city, do hereby subscribe for the stock of the Rochester and Genesee Valley Railroad Company to the amount of three hundred thousand dollars.

"Rochester, June 15th, 1852.

"The city of Rochester, by

"H. STILWELL, *Mayor.*"

"Whereupon, on motion of Mr. Pitkin, it was unanimously

"*Resolved*, That this board, in behalf of the company, accept, and they do hereby accept, the subscription of the corporation of the city of Rochester for three hundred thousand dollars ($300,000) to the capital stock of the Rochester and Genesee Valley Railroad Company." 37

The plaintiffs here rested.

The defendants offered to prove, and it was admitted by the plaintiffs' counsel, that a regular meeting of the stockholders of said company, other than the city of Rochester, was held at the office of said company, on the second Thursday of June, 1868, which assumed to elect as directors of said company Charles G. Miller, Asahel O. Comstock, David R. Morse, Levi A. Ward, Isaac Hills, William F. Miller, Henry C. Fisk, Vincent M. Smith, and Gilbert Cameron.

The defendant here rested.

The court thereupon rendered the decision printed above, at folios 62 to 77 of this case.

Supreme court.

THE PEOPLE OF THE STATE OF NEW YORK,
Daniel W. Powers, and others,
ag'st
CHARLES G. MILLER, AND OTHERS, SUED WITH
The Rochester and Genesee Valley Railroad.

To Marshal B. Champlain, esq., attorney general and plaintiffs' att'y, and to Charles J. Powers, esq., clerk of Monroe County:

Take notice, that the defendants, other than The Rochester and Genesee Valley Railroad, appeal to the general term of this court from so much of the judgment entered herein, as regards these defendants appealing.

Dated November 19, 1869.

THEODORE BACON,
Defendants' Attorney.

38 At a general term of the supreme court, held at the court-house in Rochester, on the 6th day of December, 1869:

Present, Honorable Charles C. Dwight, E. Darwin Smith, Thomas A. Johnson, justices.

THE PEOPLE OF THE STATE OF NEW YORK,
respondents,
ag'st
CHARLES G. MILLER, WILLIAM F. MILLER,
Isaac Hills, Levi A. Ward, Vincent M. Smith,
Asahel O. Comstock, David R. Morse, Henry
C. Fisk, and Gilbert Cameron, appellants.

The appeal from the judgment entered in this action on the 17th day of November, 1869, having been brought to the general term, it is now, on motion of W'm F. Cogswell, esq., counsel for respondents, after hearing Theodore Bacon for the appellants, adjudged that said judgment be affirmed, and that the respondents recover of the appellants seventy dollars and sixty cents, costs of the appeal.

W. S. FOSTER,
Special Deputy Clerk.

Supreme court.

THE PEOPLE
ag'st
CHARLES G. MILLER AND OTHERS.

To Hon. M. B. Champlain, attorney general, plaintiffs' attorney, and Charles J. Powers, esq., clerk of Monroe County:

Take notice that the defendants appeal to the court of appeals
39 from the judgment this day granted in this action at the general
term of this court affirming the judgment of the circuit court with
costs, and from the whole of said judgment.

Dated December 6, 1869.

THEODORE BACON,
Defendants' Attorney.

Court of appeals.

THE PEOPLE OF THE STATE OF NEW YORK,
respondents,
ag'st
CHARLES G. MILLER AND OTHERS, APPELLANTS.

MONROE COUNTY, *ss:*

Theodore Bacon, of Rochester, in said county, being duly sworn, says: I am and have been from the commencement of this action, defendants' attorney therein, and had charge of the same as counsel at circuit and at general term; and I know that no opinion or other statement of the reasons for the judgment was given in either case.

THEODORE BACON.

Sworn before me this 16th day of December, 1869.

H. F. HUNTINGTON,
Notary Public.

40 STATE OF NEW YORK,
Monroe County Clerk's Office, ss:

I do hereby certify, that I have compared the copy of a judgment-roll & notice of appeal, hereunto annexed, with the original now remaining on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof I have hereunto set my hand and affixed the seal of said county, this 14th day of Dec., A. D. 1869.

[L. S.] W. S. FOSTER,
Sp'l Dep. Clerk.

[5-cent revenue stamp, canceled.]

41 State of New York, in court of appeals.

At a court of appeals for the State of New York, held at the capitol, in the city of Albany, on the thirteenth day of December, A. D. 1870: Present, Sanford E. Church, chief judge, presiding.

THE PEOPLE OF THE STATE OF NEW YORK,
respondents,
against
CHARLES G. MILLER & OTHERS, APPELLANTS.

This cause having been argued by Mr. Theodore Bacon, & Mr. Henry R. Selden, counsel for the appellant, and Mr. W. F. Cogswell & Mr. J. C. Cochrane, counsel for the respondent, and due deliberation having been thereupon had, it is ordered and adjudged, that the judgment of the supreme court appealed from in this action to this court, be in all things affirmed; and it was further ordered and adjudged, that the respondents recover against the appellants their costs of appeal to this court.

A copy:

CAS. TEN BROECK,
Dep. Clerk.

42 STATE OF NEW YORK,
Court of Appeals, Clerk's Office.

I, Edwin O. Perrin, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed copy of a return filed in this office on the 15th day of December, A. D. 1869, entitled "The People of the State of New York, respondents, against Charles G. Miller and others, appellants;" also a copy of the judgment rendered therein by the court of appeals, on the thirteenth day of December, A. D. 1870, with the originals on file in this office, and that the same are correct transcripts therefrom, and of the whole of said originals, and is the whole of the record and of all proceedings in the cause.

In witness whereof I have hereunto set my hand and affixed my official seal at the city of Albany, this 27th day of December, A. D. 1870.

[SEAL] CAS. TEN BROECK,
Dep. Clerk.

(Indorsement on cover:) No. 454. Charles G. Miller, W. T. Miller, Isaac Hills, Levi A. Ward, Vincent M. Smith, Asahel O. Comstock, David R. Morse, Henry C. Fisk, and Gilbert Cameron, plaintiffs in error, vs. The People of the State of New York. New York court of appeal. Filed 30th December, 1870.

43 In the Supreme Court of the United States.

CHARLES G. MILLER, WILLIAM F. MILLER, David R. Morse, Henry C. Fisk, Gilbert Cameron, Asahel O. Comstock, Levi A. Ward, Vincent M. Smith, and Horatio N. Otis, plaintiffs in error,
vs.
THE PEOPLE OF THE STATE OF NEW YORK, defendants in error.
} In error. No. 454.

Of December term, in the year of our Lord one thousand eight hundredred and seventy-*one*.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the above-named plaintiffs in error, by Theodore Bacon, their attorney, and say, that in the record and proceedings aforesaid, there is manifest error in this, to wit: That the act of the legislature of the State of New York therein mentioned, being chapter fifty-nine of the laws of 1867, is therein held and 44 adjudged to be a valid law, whereas by the Constitution of the United States the same is void and of no effect; and there is also error in this, to wit: That the judgment aforesaid was given for the said defendants in error, and against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs in error against the said defendants in error. And the said plaintiffs in error pray the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by reason of the said judgment.

THEODORE BACON,
Attorney for Plaintiffs in Error.

(Indorsed:) U. S. Supreme Court. No. 454. Charles G. Miller et al., plaintiffs in error, vs. The People of the State of New York, defendants in error. Assignment of errors. Theodore Bacon, attorney for pl'ffs in error, Rochester, N. Y. Filed 12th January, 1871.

IN THE

SUPREME COURT

OF THE UNITED STATES.

No. 454.

CHARLES G. MILLER, and others,
Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Defendants in Error.

Brief for Plaintiffs in Error.

THEODORE BACON,
Attorney and Counsel.

ROCHESTER, N. Y.
EZRA R. ANDREWS, LAW PRINTER, 29 BUFFALO STREET.
1871.

IN THE SUPREME COURT

OF THE UNITED STATES.

CHARLES G. MILLER AND EIGHT OTHERS, *Plaintiffs in Error,*
vs.
THE PEOPLE OF THE STATE OF NEW YORK,
Defendants in Error.

No. 454.

Brief For Plaintiffs In Error.

This cause is brought here from the Court of Appeals of the State of New York by writ of error, which, with the petition therefor, bond, citation, &c., occupies pages 1 to 4 of the record as printed.

The action was one in the nature of a writ of *quo warranto*, and was originally commenced in the Supreme Court of New York, by the People of the State of New York, with whom Daniel W. Powers and six other persons, claimants of the offices in question, were joined as co-plaintiffs in accordance with a local statute, against the nine persons who are plaintiffs in error here, together with the Rochester and Genesee Valley Railroad Company. The plaintiffs charged that the nine individual defendants, Charles G. Miller and others, had usurped and unlawfully held and exercised the offices of directors of the Rochester and Genesee Valley Roilroad Company, and prayed their removal, and that the plaintiffs other than the People, should be declared entitled to those offices, and to have been so entitled since June, 1868.

The Rochester and Genesee Valley Railroad Company was made a defendant for the purpose of enjoining that corporation as well as the other defendants, from removing the office, books, papers and funds of the corporation from the city of Rochester, and from doing other wrongful acts alleged to be in contemplation by the defendants.

Record, pp. 5–8.

The corporation defendant demurred to the complaint; the demurrer was sustained at the Special Term, and there has been no appeal from that decision.

Record, pp. 8. 13, 14, 19.

The Court, at Special Term, decided that the defendants, other than the corporation, had usurped and unlawfully held and exercised the offices of directors of said corporation, and did so at the time of the commencement of this action, but it did not decide that the individual plaintiffs, or any of them, were entitled to those offices.

Record, pp. 13, 14.

No judgment was rendered in favor of the plaintiffs claiming to be directors, because they, or several of them, were not stockholders of the Railroad Company, and the Court held that none but stockholders were eligible to the office of director. Nothing, however, appears on this subject in the case.

The individual defendants appealed from the judgment against them to the General Term of the same Court, where the judgment was affirmed.

Record, p. 19.

No opinion was given at either the General or Special Term. (*Record, p. 20.*) It is understood, however, that the judgment of the Court upon the question now in dispute, proceeded upon the grounds contained in the opinion of Mr. Justice Welles, in the case of the *People vs. Hills* (*46 Barb. 344 to 348*), the judgment in which case was subsequently reversed in the Court of Appeals upon a point not involved in the present case. (*35 N. Y., 449.*)

Indeed, the Supreme Court, both at the Special and at the General Term, refused to hear any argument upon the only question which the case now presents, on the ground that that question had been decided, so far as that Court was concerned, in the case of the *People vs. Hills.*

The cause was twice argued in the Court of Appeals in 1870, once before and once after its reconstitution in July of that year; and at last the judgment was again affirmed by an equally divided Court. (See the printed *Opinions* submitted herewith, and especially at page 25; (*Record, p. 20.*)

The question presented for the consideration of this Court is, whether an act of the Legislature of New York, (*Ch. 59 of the Laws of 1867*) is or is not in conflict with section 10 of article 1 of the Constitution of the United States, providing that "No State shall * * pass any * * law impairing the obligation of contracts."

Laws of 1867, p. 92.

The facts out of which this question arises are as follows:

The Rochester and Genesee Valley Railroad Company is a corporation organized in July, 1851, under and by virtue of the General Railroad Act of April 2, 1850 (*p. 5.*) The articles of association are at *pp. 14–16.* They were signed by twenty-five persons as stockholders, with an aggregate subscription of $73,900, and were filed with the Secretary of

State July 10, 1851. The proposed length of the road was 50 miles, extending from Rochester to Portage, the capital stock $800,000, divided into shares of $100 each.

On the 3d of July, 1851, was passed "An Act to amend an act entitled 'An act to amend and consolidate the several acts relating to the city of Rochester, passed April 10th, 1850.'" *Laws of 1851, chap. 389, p. 757.*

Section 285 of this act authorizes the Common Council of the city to borrow $300,000, and to issue bonds therefor.

Section 286 provides for disposing of the bonds, and that "the money which shall be so raised shall be invested in the stock of the Rochester and Genesee Valley Railroad Company, and employed and used in the construction of the said railroad, its buildings and necessary appurtenances, and for no other purposes whatever; and for that purpose the said Common Council, in the corporate name of said city, may subscribe for or purchase stock of the said Company to the amount of the said sum of $300,000; and by virtue of said subscription or purchase of said stock, and upon receiving certificates or the transfer of certificates for the amount of said stock so subscribed for or purchased by them, the said city shall acquire all the rights and privileges, and be liable to the same responsibilities as other stockholders of said Company; *except as hereinafter mentioned.*"

Section 287 directs how the payment of interest on the bonds shall be provided for.

Section 288 authorizes the temporary loan of any portion of the money not immediately wanted for construction.

Section 289 authorizes the Common Council, under certain circumstances, to sell the stock.

Section 290 is in the following words:

"§ 290. The Common Council of the city of Rochester in case the said 'The Rochester and Genesee Valley Railroad Company' elects to receive their subscription, shall have power to nominate and appoint one Director of said Company for every seventy-five thousand dollars of capital stock, held by said city at the time of each election of Directors of said Company, but said city shall have no voice in the election of the remaining directors."

Sections 291 and 292 provide that sections 285 to 290 shall not take effect until approved by two-thirds of the electors of the city at an election therein provided for.

On the 15th of June, 1852, the Mayor of the City of Rochester, by authority and in behalf of the Common Council, and by virtue of the act of July 3d, 1851, subscribed for $300,000 of the stock.

Record, pp. 12, 18.

On the same day the Board of Directors of the Railroad Company, in view of the terms and conditions of the Act, elected to receive that subscription. (*pp. 12, 18.*)

All necessary steps and proceedings had been taken to authorize the city to subscribe for and receive the stock. (*p. 17.*)

The $300,000 of stock was fully paid for, and certificates issued therefor; and the stock has ever since been and still is owned by the City, and the Railroad Company has continued to exercise its corporate functions to the present time.

pp. 12, 17.

Thereafter, and until 1865, the city annually elected *four* and the remaining stockholders *nine* of the thirteen directors.

p. 12.

At the regular annual meeting of the stockholders on the 11th of June, 1868, the stockholders of the Company met and elected the nine defendants in this action, other than the corporation, as directors for the ensuing year.

pp. 12, 18.

On the same day the Common Council of the city of Rochester, by virtue of the act of March 9, 1867, above mentioned, the substance of which is set forth in the answer, (*Record*, *p. 11*), assumed to elect the seven persons originally named as plaintiffs in this action, as Directors of said corporation.

pp. 12, 16.

The two private statutes of 1851 and 1867 are sufficiently pleaded, in accordance with the laws of New York, for the Court to take judicial notice of them.

N. Y. Code of Procedure, § *163.*

The assumption and exercise by the defendants and plaintiffs in error of the duties of Directors, in pursuance of their election by the stockholders as above mentioned, constitutes the usurpation complained of, and of which they have been convicted.

POINTS.

I.

On the 10th of July, 1851, the twenty-five signers of the Articles of Association of the Railroad Company became "a corporation by the name specified "in such Articles, with the powers and privileges "granted to corporations" by the general provisions of the Revised Statutes.

Record, p. 16; 3 Edm. Statutes, 618, §§ 1, 4.

II.

The powers and privileges thus received were "granted" by the State. This "grant," like any other, was an executed contract.

2 Bl. Comm., 37, 38.
People vs. Turnpike Co., 23 Wend., 239.
Thompson vs. The People, Id., 540, 550, 579.
Dartmouth College Case, 4 Wheat., 627, 656-8; 4 Cond. U. S., 538, 555-6.

The State was grantor; the twenty-five corporators were grantees; the subject of the grant was the special powers and privileges, and especially the privilege of existing as a body corporate; the consideration for it was the assumption by the grantees of certain duties for the public convenience.

III.

The "Charter" of the Company—the "*charta,*" paper or instrument which defined the grant and was the documentary evidence of it, was the General Railroad Act of 1850.

"The act of the Legislature creating a corporation is called its *charter.*" (*Bouv. Law Dic., ad voc.; citing Dane's Abr., same title; see also Grant on Corp., 9, 13.*)

"The statutes under which the corporation was organized and *which constituted its charter.*" (*Shaw vs. Boylan, 16 Ind., 384, 386.*)

The articles of Association were the *evidence* which the Charter requires (*General Act, ubi supra,* §3), that certain persons had complied with the conditions on which the privileges were offered, and *accepted* the grant. For no one can be compelled to accept a grant of corporate privileges, whether by general or special, public or private, act, just as no one can be compelled to accept a grant of land.

Grant on Corp. 13.
Rex. vs. Pasmore, 3 T. R., 240.
Bailey vs. Mayor, &c., of New York, 3 Hill, 531.
Lincoln & Kennebec Bank vs. Richardson, 1 Greenl. 79, 81.
Ellis vs. Marshall, 2 Mass., 269, 276-7.
Beaty vs. Knowles, 4 Pet., 167.
Canal Co. vs. R. R. Co., 4 Gill & J., 1.

This very right, in fact, of accepting or refusing franchises is what makes the transaction, when they are accepted, a *contract*, and not a mere act of arbitrary legislative power.

IV.

The same right of rejection applies to the *extension* of the grant of franchises beyond the term for which they were originally granted; and to the *modification* of it, apart from any question of a right reserved in the grant itself.

See all the authorities last cited.

That is, as the cases agree, a citizen can no more be compelled by the State, having accepted a franchise for twenty years, to continue holding it for ten years more than he could have been compelled in the first instance to accept it for thirty years. He can no more be compelled, having accepted a franchise to build a turnpike from Albany to Syracuse, to hold it as a franchise to build one from Albany to Buffalo, or from Albany only to Schenectady, than he could have been compelled in the first instance to accept the latter franchise.

Foster vs. Essex Bank, 16 Mass., 245, 250-1.

V.

This contract (Point I) once complete, was unalterable by either party without the consent of the other.

We do not consider it at all necessary to our case that this position should be maintained. We do not regard the act of 1867 as an exercise of a power to alter the charter. But as this is the only ground on which the defendants in error attempt to stand, we undertake to maintain that no such power exists.

It is true that the grantor has endeavored to reserve such a power over it.

The Constitution of New York, established in 1846, ordains: "Corporations may be formed under general laws; but shall not be created by special act, except" in certain cases. "All general laws and special acts passed, pursuant to this section may be altered from time to time, or repealed." (*Art. 8*, § *1.*)

The Revised Statutes (1830) enact: "The charter of every corporation that shall hereafter be granted by the Legislature, shall be subject to alteration, suspension and repeal in the discretion of the Legislature." (*1 R. S.*, *600*, § *8.*) And the General Railroad Act (§ 1) subjects all corporations organized under it to the provisions contained in certain sections of the Revised Statutes, of which that last quoted is one.

We do not deny that by virtue of one or more of these provisions, or at all events of section 48 of the General Rail Road Act (providing that "the Legislature may at any time annul or dissolve any corporation formed under" it), the grantor has incorporated in its grant a power of *revocation.*

But we insist that, whatever it may have intended, it COULD NOT, nor could both parties together, incorporate in it a power of indefinite *alteration*, without the consent of the grantee.

What is a power to alter the contract, but a power to substitute another contract for it?

"If the assent of all the parties to be bound by a contract be of its essence, how is it possible that a new contract, substituted for or engrafted on another without such assent should not violate the old?"

Per Washington, J., Dartmouth College Case, 4 Cond. U. S., 559.

It is answered, that the *assent*, which is admitted to be necessary, is given in advance, in accepting the original grant; that the grantees then agreed at any time to accept any different grant on any different terms, at the will of the grantor.

But such presumed "assent" is impossible. One cannot consent to that which is utterly unknown and unascertainable.

The State and the citizen in such a case are equal contracting parties.

Providence Bank vs. Billings, 4 Pet., 518, 560.
Fletcher vs. Peck, 6 Cranch, 87; 2 Cond., U. S. 308, 322.
Green vs. Biddle, 8 Wheat., 1; 5 Cond. U. S., 369, 391.

The citizen cannot, therefore, by stipulation, give the State a power over their contract, which the State might not in the same way give the citizen. What would the Courts say to a stipulation in a charter, that the *corporators* might at any time, alter, amend or surrender it? They would hold the right of surrender valid; and the right of alteration to extend only to the proposing of amendments for the acceptance of the State.

Precisely this is the effect given by the Court of Appeals of Kentucky to the reservation in a charter of the right "*to alter, amend or repeal*" it.

"If, from mal-administration or otherwise, the Legislature should, at any time, deem it expedient to put the Institution out of existence by a repeal of its charter, they have the unquestionable power to do so; but they have, in our opinion, no right or power to compel the trustees to *accept* any act which they may pass, although in their estimation it may comport with the power reserved. Indeed, we perceive but little, if any, utility in a reservation of power to alter or amend, when it strikes us as axiomatic that the Legislature can impose no alteration or amendment upon the trustees without their consent, either with or without the reservation. The Legislature can no more force the trustees to *accept* an alteration or amendment of their charter, than they could have forced them to accept the original charter. Under the reservation they can repeal or destroy, without any consent on the part of the trustees, but as long as they remain in existence as a corporate body, they necessarily have the power to reject an amendment."

Sage vs. Dillard, 15 B. Mon., 340.

To the same effect the Supreme Court of New York, in *Troy & Rutland R. R. Co. vs. Kerr, 17 Barb., 581, 603.*

See also *City of Louisville vs. University of Louisville, 15 B. Mon. 642.*

But the contract which the act of 1867 seeks to change was not the contract between the twenty-five corporators and the State. It did not exist until eleven months after that had been fully executed.

VI.

At the moment (July 10, 1851) when the twenty-five associates had perfected their acquisition of corporate powers from the State, and had "become a corporation by the name" of "The Rochester and Genesee Valley Railroad," there existed another body corporate, organized for municipal purposes only,—the City of Rochester. By its original charter this corporation had no power to become a stockholder in a Railroad Company.

Thompson vs. Lee County, 3 Wall., 327.
Evansville, &c., R. R. Co., vs. Evansville, 15 Ind., 395.
Town of Duanesburgh vs. Jenkins, 46 Barb., 294.

VII.

But thinking, apparently, that the city might desire to take and hold stock in the Company, and that the Company might desire to receive the city as a corporator, the Legislature passed AN ENABLING ACT (*Laws of* 1851, *ch.* 389), in the form of an amendment to the city charter.

See Cases last cited.

That this Act is exactly what we call it, and nothing more nor less, has already been decided in the highest Court of New York.

Clarke vs. City of Rochester, 28 N. Y., 605.

"The general purpose of the sections referred to was *to enable* the city corporation, *upon certain conditions*, to subscribe for and become the purchaser of stock," &c. (*By the Court, p. 631.*) "They are in the ordinary form of an enabling statute," &c. (*Id., p. 632.*) "The intent was *to enable* the corporate authorities," &c. (P. 635.)

This gave *permission* to the two corporations to enter into the relation in question. This relation is one of contract (*A. and A. on Corp., chap. XV; Lake Ontario, &c., R. R. Co. vs. Mason, 16 N. Y., 451, 463; and note, p. 460; McCray vs. Junction R. R. Co., 9 Ind., 358.*)

The terms of the contract which the parties were permitted to make were distinctly expressed in the act permitting it (§§ 286, 290). It was to be nearly the same as the ordinary contract of subscription, but with express limitations upon the right of the city, and the rights of other stockholders, to vote in elections of officers.

VIII.

The Legislature could not have compelled the parties to enter into this contract (*Town of Duanesburgh vs. Jenkins*, 46 *Barb.*, 294, 308; *and see opinion of* Foster, *J., in this case, p.* 31); and it did not seek to do so. It expressly left it optional with each to make the contract or not. (Act, § 285: "it shall be *lawful* for the Common Council," &c.; § 286; "The Common Council * * * *may* subscribe for or purchase stock;" §§ 291, 292: the enabling sections not to take effect until approved by two thirds of the electors; § 289: "in case the said * * Railroad Company *elect to receive* their subscription.") But *this* was the only contract they were permitted to make. Up to $300,000 of stock they might make their bargain on those terms; if they did not like the terms they need not contract. If the city had insisted on having seven Directors, and the Company had acceded to it, the contract they would have essayed to make would have been simply null.

Bell vs. Railroad Co., 4 Wall., 598.

IX.

Enabled by this act, the parties, on the 15th of June, 1852, solemnly executed the authorized contract, "*in accordance with the terms and conditions of said act*" (*p.* 12), fixing the amount of stock subscribed for, in the exercise of the discretion allowed to them, at $300,000.

Record, pp. 12, 18.

X.

The condition referred to was a valuable one, upon one side or the other, or upon both, and one that could be enforced in the Courts. If the Board of Directors had excluded the four appointed by the city from their meetings, they could have been compelled by *mandamus* to admit them. If the individual stockholders had sought to elect thirteen instead of nine, the four city directors could have maintained *quo warranto.* On the other hand, if the city had sought to vote upon its 3,000 shares at the general election, and there was danger that the inspectors would receive its vote, injunction would have restrained the wrong. And if it had assumed to choose, by its Common

Council, ten instead of four, out of the thirteen, and they had seized upon the organization and property of the Company, unquestionably some remedy would have been found for the invasion of a right secured not by statute, but by contract, to the other stock holders.

See opinions of Foster, J., in this case, pp. 35–6; of Rapallo, J., pp. 8, 9, 12; of Allen, J., pp 16, 18. Ashby vs. White, 2 Ld. Raym., 938, 950, 951, 953, 956, 958.

The condition was important to the city, in contemplation of a capital of $800,000 (*p. 14*); for it secured its representation in the Board, however unanimous against it the majority of the stock should be, so long as it should hold as much as $75,000.

It was important to the other stockholders, because it protected them against being overslaughed by 3,000 votes cast in a block, upon the vote of a Common Council. They needed its protection, even if the whole 8,000 shares were issued; for experience showed that 3,000 votes in mass will always control, in a corporate election by 8,000. Still more didthey need it in the contingency, which every one at the time was bound to contemplate, and which actually followed, that less than the entire capital should be taken up. And upon the faith of this security, more than a quarter of a million dollars, which we, in the main, represent here, has been paid by individuals for the purposes of this corporation. (*Pp. 12, 16.*)

XI.

Up to this moment the corporate "powers, privileges and franchises," which the Railroad Company had fully acquired from the State on the 10th of July, 1851, were exactly what they were at that date. They had already, it is probable, admitted other persons to share those powers and franchises with them; how many the record does not show; it only appears that, first and last, more than 6,000 shares were added to the 739 shares which the twenty-five original associates took (*pp.* 12, 16). All these were admitted to share in the corporate franchises, which were *the only grant* the State made, and in the tangible property which their joint contributions should create, exactly in proportion to their respective contributions, both as to the control of it, and as to the distribution of the profits. But no alteration in the State's grant had yet been made, either by the admission of these shareholders, or by any other process.

For the distinction between the *franchises* which were the sole subject of the State's grant, and the *other* corporate property, which the State did not give and could not recall, see *Gordon vs. Appeal Tax Court*, *3 Howard*, *133*, *150*.

XII.

Nor did the admission of this new associate, upon terms differing in a single respect from those on which others were admitted, in the slightest degree alter the *grant* from the State, or the *charter*, in whatever instrument contained, which was the evidence of that grant.

Up to 1867, therefore, when the disputed act was passed, the Company's original "charter" was unchanged, except so for as it may have been modified by successive amendments of the General Railroad Act.

XIII.

The right of the State to alter, amend or repeal the Act of 1851, by authority of which this contract was made, is not questioned. The only question is as to the effect of such legislation.

Suppose the Legislature, in 1867, instead of the passing act in dispute here, had simply *repealed* sections 285 to 292 of the Act of 1851, what would have been the effect of the repeal? Those sections authorized the city to issue bonds, many of which are still outstanding; would the repeal have made them void? They authorized it to subscribe for stock in the Railroad Company; would it cease to be a stockholder? If so, who would own the stock? Or would it also become void? They provided a method for paying the interest on the bonds (§ 287); no doubt the repeal would leave it optional with the city to use other methods, unless, indeed, as has been held (*English vs. Supervisors, 19 Cal., 172*), the holders of the bonds could insist upon that particular provision as part of their contract. The sections provided (§ 289) that the city might sell the stock; a repeal perhaps would take away that power. They provided (§§ 291–2) for a city election, upon the result of which the sections would take effect; would a repeal of those two sections make the election never to have been had?

To all these suppositions there can be but one answer. The effect would be like that of repealing any other enabling act, after the act it authorized is done. No doubt the State may "amend or repeal" an act to authorize J. S., an infant, to convey White-acre in fee for $5,000. But if J. S. has conveyed the lands in fee for $5,000, to repeal the act will hardly divest his grantee; while to amend it so as to authorize J. S. to convey Black-acre instead of White-acre, or to lease for 99 years, instead of conveying in fee, or for $4,000 instead of $5,000, will hardly be of much efficacy.

So, there can certainly be no doubt of the right of the

State to "alter, amend or repeal" the law relating to partnerships. And if, after I have executed articles of co-partnership, upon terms authorized by the existing law, the Legislature enacts that partnership affairs shall be carried on upon different terms; that my partner shall have henceforth the exclusive management of the business, does that "impair the obligation" of my contract, or not? And how is that a stronger case than the one at bar? If in either of the supposed statutes the right to "alter, amend or repeal" it which existed without anything being said, had been reserved in terms, would that have made the case any stronger?

Counsel for defendants in error have not flinched, indeed, upon former arguments, from maintaining that the Legislature, in the case put as to partnerships, *if it had "reserved the right to amend* the law," *might* interpose and alter a partnership agreement valid and lawful when made. The principle thus asserted, which is essential to the support of their case, cannot be distinguished from the one set forth in the following terms, by high authority, only in order to dispose of it in the terms with which the quotation closes.

"If, therefore, the Legislature should provide by a law, that all contracts thereafter made should be subject to the entire control of the Legislature, as to their obligation, validity and execution, whatever might be their terms, they would be completely within the Legislative power, and might be impaired or extinguished by future laws, thus having a complete *ex post facto* operation. Nay, if the Legislature should pass a law declaring that all future contracts might be discharged by a tender of any thing or things, besides gold and silver, there would be great difficulty in affirming them to be unconstitutional; since it would become a part of the stipulation of the contract. And yet it is obvious *it would annihilate the whole prohibition of the Constitution* upon the subject of tender laws."

3 Story's Commentaries, § *1377*.

Where a statute is repealed, "acts done in the meantime, while it was in force, shall endure and stand, and be good and effectual."

Jenk. Cent., 233, pl. 6.
Dwarr. Stat. (9 Law Library), 675.
Fletcher vs. Peck, 6 Cranch, 87.

Will it be pretended that an amendment can have effect where a repeal would unquestionably have none?

XIV.

The Act of 1867, then, was no attempt to change the Company's "Charter," which, as has been shown above, remained at the time that Act was passed exactly what it was when the Company first received it, July 10, 1851, unless it might have been modified by various amendments of the General Railroad Act. What it did seek to do was to modify the lawful agreement of June 15, 1852, between the corporators, which had no effect whatever upon the Charter. No doubt the agreement recognizes the Charter. No doubt the city said, in effect, in subscribing for stock, "I know your privileges are precarious; I know you are liable to have them revoked; of that, in becoming one of you, I take the risk, as you did when you filed your Articles of Association, counterbalanced as that risk is by certain advantages I see in becoming a stockholder; but I do it, and you accept me, upon the condition which the State authorizes us both to make, that as between you and me the mutual interference and control shall be thus and so." And today either party to that agreement may say of that

Act, in the language of the Supreme Court of Pennsylvania: "This is a violation of chartered contract; *not* the supposed one between the government and the corporators, but the one between the corporators themselves; * * * even the Legislature cannot authorize this, for by doing so they would authorize the destruction of one private contract and the compulsory creation of another in its stead."

Lauman vs. Lebanon Valley R. R., 30 Pa., 42.
See also Railroad Co. vs. Harris, 27 Missi., 517.
Allen vs. McKean, 1 Sumner, 278.
Hawthorne vs. Calef, 2 Wall., 10.
Commonwealth vs. Essex Co., 13 Gray, 239, 253-4.

In Zabriskie vs. Hackensack & N. Y. R. R. Co., 3 C. E. Green, 178, the precise point decided is, that the reservation in a charter of the right to alter, amend or repeal it *cannot affect or change the rights of corporators as between themselves.*

In *Kenosha R. R. Co. vs. Marsh, 17 Wis. 13, 16, 17*, the Court says: "This power was never reserved upon any idea *that the Legislature could alter a contract between a corporation and its stockholders.*"

XV.

Several cases in the New York Court of Appeals have been especially relied upon hitherto by the defendants in error. Of course their authority, if they were adverse, cannot conclude us in this Court. But they do not conflict, when properly regarded, even with the extreme view which we present here. They are these:

Schenectady & Saratoga Plank Road Co. vs. Thatcher, 1 Kern., 102.
Buffalo & N. Y. City R. R. Co. vs. Dudley, 14 N. Y., 336.

In these the corporations solemnly *accepted* additional powers from the State, as they had a perfect right to do. Subscribers to stock were held, and very properly, not to be thereby discharged from their subscriptions.

The supposed "reserved power to alter" the charters had nothing to do with it. Will it be maintained that the State, under the "reserved power" could, *against the will* of the companies, have compelled them to raise more money and build branch roads?

In *Oliver Lee's Bank* (*21 N. Y.. 9*), the State, in its Constitution of 1846, having power to revoke its former grants of franchises to banking corporations, afforded them the option between three courses after 1850: Either (1) to cease the issue of circulating notes; or (2) to submit to an individual liability of stockholders for all debts which should be incurred after that date; or (3) to surrender their corporate franchises.

It is true that only the first two and not the third, alternative, were in terms proposed by the Constitution. But as it will hardly be said that the State could *compel* the corporations to continue the issue of bank notes, or the prosecution of other business, upon the new terms imposed, the option of surrender must also be considered as granted.

It was held that the corporation had elected to receive the altered franchise (*p. 20*), and that a stockholder, who might, if he disapproved, have sold his interest in the corporate property, could not escape the burden of the diminished privileges if he acquiesced in the continuance of corporate business.

This judgment was affirmed in this Court (*sub nomine Sherman vs. Smith, 1 Black, 587*), and in such a way as to prevent it from having any weight against the positions we have assumed.

The Reciprocity Bank (22 N. Y., 9) is merely a reaffirmance of the last case.

XVI.

1. The right of the stockholders to elect directors for the management of their property was a valuable right, enforceable by legal remedy, and was itself property.

> *Ashby vs. White, 2 Lord Raym., 938, &c.*
> *Opinions of Judges in this case cited under Point X, supra.*

2. The Act of 1867 was an attempt to deprive the stockholders of this valuable right or property, *without due process of law;* and was therefore void.

> *Const. U. S., Amendments, Art. V.*

XVII.

The Act of 1867 being without effect to impair the obligation of the contract of June 15, 1852, or to deprive the individual stockholders of their right to choose directors, the plaintiffs in error were rightfully chosen directors of the Railroad Company; the judgment of ouster should be reversed, and judgment ordered for the plaintiffs in error and defendants below.

THEODORE BACON,
Attorney for Plaintiffs in Error and Counsel.

STATE OF NEW YORK.

IN THE

COURT OF APPEALS

THE PEOPLE OF THE STATE
OF NEW YORK,
Respondents.

AGAINST

CHARLES G. MILLER AND OTHERS,
Appellants.

OPINIONS

of Judge **FOSTER**, on the first argument,
and of Judges **RAPALLO** and **ALLEN**,
on the re-argument.

ROCHESTER, N. Y.
EZRA R. ANDREWS, LAW PRINTER, 29 BUFFALO STREET.
1871.

COURT OF APPEALS.

THE PEOPLE OF THE STATE
OF NEW YORK,
Respondents,
AGAINST
CHAS. G. MILLER, AND OTHERS.
Appellants.

Opinions delivered after the re-argument had October 22 and 25, 1870.

RAPALLO, J.

The act of July 3, 1851, was permissive only. It made it lawful for two corporations to enter into an arrangement by which one of them might become a stockholder in the other if both should consent, and declared what the rights of the parties to the arrangement should be as between each other if they availed themselves of this permission. It was optional with both to avail themselves, or not, of the privilege. There was no exercise of legislative will further than to confer the power; all beyond that depended upon the mutual consent of the parties.

The making and the acceptance of the subscription to the stock were acts of the parties, and they thereby adopted the conditions contained in the act of the legislature and mutually consented to be governed by them. The consent of each party must be deemed to have been given in consideration of the obligation thus assumed by the other, and a valid contract was thus made between the subscriber to the stock and the other stockholders of the Railroad Company, or the company representing the rights of such stockholders, unless it can be shown that the subject matter of the arrangement was one concerning which a contract could not be made or authorized by the Legislature to be made.

The City of Rochester, by this arrangement, secured to itself the right of appointing four out of the thirteen directors. This was a valuable right, for in its absence, if the stock of the Company should all be paid up, the city holding but a minority of the stock, might not have been able to obtain the election of any director of its selection. In consideration of this privilege the city surrendered to the other stockholders the right to elect the remaining nine directors.

The Railroad Company, in consideration of that surrender, bound itself to admit the four city directors.

Neither party can be presumed to have acted on the assumption that this arrangement could be changed without its consent. It may well be supposed that those interested in the Company and who had embarked, or were about to embark, their capital in it, would not have consented to place so large an amount of stock in the hands of the city, had they not been secured against the possibility of the control of the affairs of the Company becoming invested in so changing and uncertain a body as a municipal corporation, whose officials would have no personal interest in the road and no special inducement to manage it in the interest of its stockholders.

It is claimed, however, that the power reserved in the constitution and statutes of the state of New York, to alter, suspend or repeal the charters of all corporations, gives power to the Legislature to change the terms upon which the subscription was received, and to enlarge the number of directors to be appointed by the city, and that the act of 1867, which purports to authorize the city to appoint seven directors instead of four, thus giving to the city the majority instead of a minority representation in the board, is valid as an amendment of the charter of the Railroad Company.

The validity of that act is the question to be determined in this case.

The extent to which this power to alter, suspend or repeal the charters of corporations may be exercised without conflicting with the provisions of the constitution of the United States, has been the subject of much discussion in this and other states, as well as in the Federal courts, and some principles which may aid in the solution of this question can be evolved from the numerous decisions upon the subject.

The purpose and object of this reservation of power is generally conceded to have been to prevent the alienation by the state, of corporate franchises, in such form that they could be held as against the state free from that legislative control, which the public interests might from time to time require. When it was settled by the Supreme Court of the United States, that an unconditional charter to a private corporation was a contract between the state and the corporation, which could not be impaired by state laws, and that franchises thus granted could never be withdrawn, several of the states resolved to make no more such irrevocable contracts, and either by general laws or provisions in the charters themselves inserted the condition that such charters might be altered or repealed.

In this state the constitution has deprived the Legislature of the power of granting irrepealable charters, and there is now no power to make a grant of this description, which shall operate as an irrevocable contract on the part of the state.

But this reservation is for the benefit of the state alone, and affects only the relations between it and the corporation. The exercise of this reserved power may, undoubtedly, indirectly affect private rights and interests which are dependent upon the powers and franchises of the corporation itself, but no others. The individual rights and interests of the members of the corporation, or of persons dealing with it, cannot be acted upon directly by the Legislature even under the form of an amendment of the charter. A contract between individuals or between a corporation and individuals is not subjected to the action of the Legislature by the mere fact that it is embraced in a charter or an amendment to a charter, or results from a dealing had with reference to such an enactment. The state has power to revoke its own contracts where it has in making them reserved such right. But it has no power to impair the lawful contracts of its citizens, or even of corporations created by it. When such contracts relate to the rights of individuals and not to the powers of the corporation, any attempt to reserve such a power would be ineffectual.

Story on Const., Sec. 1383 and 1384.

And a state constitution is no more effectual for such purpose than a statute.

Dodge vs. Woolsey, 18 How. U. S., 331.

Thus it was held in the case of *Hawthorn vs. Calef, 2 Wall., 10*, and other cases, that when a provision in a charter of a corporation imposed liabilities on its stockholders, for debts created by the corporation, a law repealing such provision impaired the obligation of a contract as to creditors existing at the time of such repeal.

So in *Woodruff vs. Trapnall, 10 Howard U. S., 190*, where a charter of a bank contained a provision that the bills of the bank would be accepted in payment of dues to the state, such assurance was held to be a contract with all persons who received the bills.

In *Curran vs. The State of Arkansas, 15 Howard U. S., 304*, a provision in a bank charter, that a certain fund should be responsible for the debts of the bank, was held to constitute a contract with creditors of the Bank not to divert the fund, and that an act of the Legislature withdrawing the fund was void.

The same principle has been held applicable where the rights involved, instead of being those of creditors were those of stockholders.

In *Zabriskie vs. Hackensack and N. Y. R. R. Co., 3 C. E. Greene 178*, the doctrine is stated, that the reservation in a charter that the state may at any time alter, amend or repeal it, is a reservation of the state for its own benefit and is not intended to affect the rights of corporators as between each other; that it does not empower the state to authorize one part of the stockholders for their own benefit and at their mere option to change their contract with the other part, but is confined to the powers and franchises granted to the corporation by the charter.

Although in the case cited the doctrine was applied in a manner inconsistent with some of our own adjudications, none of the latter will be found to conflict with the doctrine itself.

In the case of *Oldtown and Lincoln Rail Road Co. vs. Veazie, 39 Maine, 571*, the charter required that not less than 11,000 shares should be subscribed before the subscriptions could be enforced by calls.

The defendant subscribed for one thousand shares. Only 9,500 shares were subscribed in all. A supplemental act was then passed, reducing the limit to 8,000 shares. It was held that the reserved power to amend the charter did not authorize a change in the liability of the stockholders as between themselves.

Shepley, J., uses this language:

"It is the charter only, and the rights and the liabilities of the corporators as such in consequence thereof, that can be varied by an act of the Legislature, not the private contracts between the corporation as one party, and the corporators as the other."

Upon the principles recognized in these cases it would seem clear, therefore, that stockholders contracting with the corporation or with each other respecting their relative rights in the property or management of the corporation, in pursuance of an act of the Legislature authorizing such contract, are protected by the Constitution of the United States, provided the subject of the contract be confined to the rights and interests of the members as between each other, and do not affect the rights or powers of the corporation in its relations to the public. Such contracts, when made in pursuance of law, can only be abrogated by the repeal of the charter itself, and if they relate to the property of the corporation they would, after such repeal, govern its distribution.

There is nothing in this position which could be perverted into an authority to create irrepealable charters by contract. Wherever the power is under general laws delegated to individuals to assume corporate franchises and frame their own charters in the form of articles of association, that delegation of power is subject to the constitutional condition that all such contracts, so far as they relate to corporate franchises, shall be liable to modification by the Legislature.

The cases of *Oliver Lee & Co's. Bank*, *21 N. Y.*, 9, *and 1 Black*, *587*, and *The Reciprocity Bank*, *22 N. Y.*, *9*, which are mainly relied upon by the respondents, are in strict accordance with the views here maintained. The alterations in those charters related to the franchises. One of the chief privileges which may be granted by an act of incorporation, is that of doing business as an aggregate body without that individual liability of the members which, but for the incorporation, would necessarily attach. By the amendatory acts the prospective enjoyment of that privilege was taken away from these corporations. No attempt was made to impose on the members liability for existing contracts of the corporation. The amendment affected the whole body alike, and declared that for all contracts the corporation should make after January, 1850, the members should be liable. This was clearly within the scope of the power reserved, and essentially different from the present case.

In all the adjudications to be found in which the exercise of this power has been maintained, the amendment has related to the corporate franchises and only incidentally affected the rights of the stockholders, through the interest which they had in the franchises of the corporation itself, and affected the interests of all the stockholders alike.

The cases which have gone the greatest length in support of this power are within this limit. They are those in which the corporate powers have been enlarged after subscriptions to the stock, and the subscribers held not to be discharged by this enlargement of the corporate enterprise.

Schenectady and Saratoga Plank Road Co. vs. Thatcher, 11 N. Y. R., 102.

Buffalo and N. Y. City R. R. Co. vs. Dudley, 14 N. Y. R., 336.

In these and kindred cases the alteration affected purely the powers and duties of the corporation in its relations to the state and to the public, and the subscriber to stock as well as the purchaser of stock must be deemed to have contracted with reference to the conceded power of the Legislature over those subjects.

There are other acknowledged limits to the exercise of the reserved power of amendment where it trenches upon vested rights or rights of property of the corporation.

In the case of *Commonwealth vs. Essex Company, 13 Gray, 239*, the doctrine is maintained that "When under power in a charter rights have been acquired and become vested, no amendment of the charter can take away the property or rights which have become vested under the legitimate exercise of the powers granted."

See also *Durfee vs. Old Col. R. R.*, *5 Allen, 230, 240, 247 and Roxbury vs. Bost. & Prov. R. R., 6 Cush., 424.*

It is claimed, however, that, conceding the principle that contracts between the corporation and its stockholders, though resulting from provisions of the charter, may be protected by the constitution of the United States when they do not relate to the franchises of the corporation, yet the right of stockholders to vote on their stock or to appoint the directors or managers of the Company is a chartered right and subject to the reservation in the state constitution.

This position necessarily leads to the result, that the right of stockholders in private business corporations to vote upon their stock is wholly under the control of the Legislature; that it can not be secured by any contract; and that whether claimed under the provisions of the charter or under a contract made in pursuance of legislative authority, it may at any time be taken away *in toto* from the stockholders by a mere exercise of the will of the Legislature.

This result is inevitable, for if the right of voting and the extent of the voice which each stockholder shall have in the management of the property and the affairs of the corporation are mere charter rights or franchises created by the act of incorporation, and within the scope of the power to suspend, alter and repeal reserved in the constitution, they can not even by authority of the Legislature, be withdrawn from the exercise of that power, and they can at any time be taken away entirely from the stockholders without their consent.

There is no attempt in the argument presented on the part of the respondents to evade this conclusion. On the contrary, it is expressly asserted in their argument, that under the exercise of that reserved power the Legislature might if it saw fit enact that the directors of some or all the railroad corporations of the State should be appointed by state authority. This proposition, if correct, applies to every species of private corporation; manufacturing, trading and monied corporations are all equally affected by it.

The soundness of that proposition is directly in question in this case, and its maintenance is indispensable to a determination in favor of the respondents; and in addition to establishing that, they must maintain the further proposition, that the power of the Legislature by amendment of the charter to take away entirely the rights of the stockholders to control the management of the property of the Company, and to vest that right in the state, includes the further power to take that right from a portion of the stockholders, and vest it in the residue, and that such an act would be an amendment of the charter of the corporation.

If, on the contrary, this right of the members of the corporation to control the management of property which they have invested in the corporate business is not wholly the creation of the Legislature, but is one of those rights of property which falls within the protection of the Constitution of the United States, then it necessarily follows that the Legislature cannot arbitrarily take it away without due process of law, under color of this reserved powof amendment, but that it is as much protected as any of the other rights which come under the general denomination of property, or the physical objects to which the rights of property are attached.

There can be little difference of opinion upon the point that the most essential element of a right of property is the right to manage or control the management of the object which is in common parlance designated as property. But it is claimed in answer, that by investing property in a corporate enterprise, the owner consents to subject its management to the control of the Legislature.

This is true to a certain extent; but the fallacy of this argument as applicable to the point now in question consists in the omission to qualify the extent to which the owner has, by thus investing his property, parted with his own power over it.

He has doubtless restricted himself to the use of the property while so invested, in such business as the State may sanction, and through such agencies as the State may permit him to appoint; but he has not consented to part with his control over its management within those limits.

That the stockholders of a private corporation owning property employed in business, are protected in the ownership of that property, is conceded. This concession is of little avail, however, unless it be also conceded that the stockholders in the aggregate have the control, the management of that property through the agencies which they are permitted to create. The very essence of the charter of a private business corporation is to extend to individuals the privilege of embarking their aggregated capital in business, and to carry on such business in a corporate name, for their own benefit, under such restrictions as the law-makers may see fit to impose for the security of the public. The joint property is held by the corporation for the benefit of its members. They select the custodians and managers. When they place their property in that condition, they of course know that they may be controlled by the Legislature in its use, in so far as any rights derived solely under their charter are concerned, where a power of alteration and repeal is reserved; that the manner in which they may manage their property may be changed, their corporate privileges enlarged or diminished, and the agencies which they may employ, varied and regulated; they may be bound to appoint such officers as the law may require, and to distribute the powers in a prescribed manner, and this organization may be changed from time to time.

The Legislature which creates the artificial body must necessarily have power to prescribe the organs through which it shall act. But this is a vastly different thing from arbitrarily taking possession of the corporation itself, and through it, of the property of the parties for whose benefit the corporation was created. They cannot be presumed to have anticipated that a charter giving them the privilege of managing their property for their own benefit in a certain way, could be transformed by this reserved power of amendment into a vehicle which should transfer from them to the State, or its appointees, all control over the property which they have invested in the corporate enterprise. To hold such a doctrine would be effectually to place all property invested in corporate enterprises beyond the pale of the protection of the Federal Constitution. Such an act would approach much nearer to one of confiscation than of legislation.

It is a startling proposition, that an act of the Legislature taking from the stockholders of every railroad, manufacturing, navigation, insurance and other business corporation in the State, the power of choosing directors and placing the control of the property and affairs of those companies in the hands of officers appointed by State authorities, would be a legitimate exercise of legislative power, and would not be an unconstitutional interference with private property; and it seems to me still more difficult to justify an act, which should select some favored stockholder in each company and transfer from his associates to him the power of selecting the managers. The State possesses all the power requisite for its own protection in the reserved right to control the action and franchises of the corporation as a body, and even to repeal its charter. It has no interest in the internal arrangements which affect only the rights of individual members, as between themselves, and if injury to the State were possible from any such arrangement, it is not necessary for its own security that the State should legislate between the individuals upon the subject of their individual rights, for it can, at any moment, repeal the charter, and in that case each shareholder would be entitled to resume his *pro rata* share of the corporate property.

Should the State ever deem it necessary to assume the management of the railroads, the only lawful way in which it could take them would be by the exercise of the right of eminent domain, on making compensation to the private owners for their interests therein. On no other terms can the State lawfully take possession of structures erected by private enterprise and private capital.

This right of the shareholders to select the managing officers of the Company is a right attached to their property, and not one created solely by the Legislature as a part of the corporate franchises; a contract therefore relating to that right is not subject to the objection that it attempts to fasten upon a portion of the repealable franchises contained in the charter the sanctity of a contract, and thus to defeat the power reserved by the State Constitution.

It being a right of the owners of the stock of the corporation in the aggregate, not created by statute, but resulting from and a necessary incident of their ownership of the property invested in the corporation, it is entitled to protection as a property right, and cannot be taken away from them. It is therefore a subject concerning which they have a right to contract if permitted by the charter so to do.

The provisions of a charter prescribing what officers the corporation shall have, at what times they shall be elected, how the powers of the Company shall be distributed between them, and all other matters appertaining to the organization of the Company, are creations of the Legislature, and therefore subject to the power to alter and amend, and the stockholders could not by contract, even if authorized by a statute to make it, place the regulation of those matters beyond the power of the Legislature, for that would conflict with the State Constitution. But the right of the stockholders to appoint their agents not being a corporate right created by the Legislature, but the right of the individuals, and incident to their property, there can be no ground upon which the right to make a contract with reference to it (if authorized by law at the time when made) can be denied. It stands upon the same footing as their right to contract with reference to their shares. In both respects this right can be regulated by law; but after such a contract has been made in pursuance of law, its obligation must be respected.

If, therefore, a corporation, representing its stockholders, under authority of a statute admits new stockholders upon condition that the latter shall have a greater or less voice in proportion to their stock, in the election of directors, than the existing stockholders have; and the subscription is made and accepted on that condition, a contract is formed between those two classes of stockholders by which one has for a consideration yielded a portion of its rights to the other.

The franchises of the corporation are not affected, but simply the rights of different classes of stockholders as between each other.

None of the cases which have been decided in this or our sister states upon this subject, have gone so far as to hold that such a contract would not be inviolable.

They all concede that the contracts of the corporation or its members, though springing from the charter, are protected. No one will deny that a pecuniary benefit secured to individual members of a corporation by virtue of a provision of the charter would be protected. Suppose that by an amendment to a charter the corporation was authorized to raise money by the issue of bonds, the interest on which should be paid out of the earnings before any dividend should be paid to the stockholders; would a law subsequently passed amending the charter by taking away that security be a legitimate exercise of the power of amendment? Or if instead of bonds the corporation should be authorized to issue preferred stock to its creditors, could the Legislature, after the issue and purchase of the stock, repeal the preference? Or, to come still nearer to the point at issue, suppose the corporation were authorized to confer upon such persons as should purchase bonds, the right to vote at elections of directors, and persons who would not be willing to advance their capital if entrusted wholly to the management of the stockholders should be induced by the security thus afforded to them to advance their money, and the corporation should obtain it on that security, would the Legislature, after the advance had been made and accepted on those terms, have power, under color of an amendment of the charter, to say that no such bond-holder should be allowed to vote ? Or suppose that under a power granted by the Legislature one class of stockholders should, for a valuable consideration, assign the right to vote upon their shares to another class, would an act passed after the transfer had been made and the consideration paid, setting aside such transfer, be any more valid than an act which should set aside a transfer of the shares themselves ? No adjudication has yet gone so far as to justify an affirmative answer to these questions.

Here the city advanced its money on the express condition that it should have four directors, and the company accepted the subscription on the express condition that the city should have no voice in the selection of the residue.

If this contract is binding in either respect it is in both; and the question is the same, save from some questions which might arise from the city being a public corporation, as if the act had entirely deprived the city of any voice in the direction after it had advanced its money on the faith of the condition.

A clearer case of violation of contract could hardly be conceived.

It is no answer to say that the amendment works so as to secure an equitable result. If the arrangement which it assumes to change was a contract, it makes no difference whether it was unduly beneficial to one party or another. The Legislature has no power over it.

Neither is it an answer to say that the contract could be evaded by reducing the number of directors. That question is not now before us. The case has not arisen, nor is it to be presumed that the Legislature, if satisfied that there was a contract, would sanction such an evasion of it. But if it were shown that such an evasion would be successful, that only proves that the contract was not sufficiently guarded in its terms. It does not prove that its obligation could be impaired without a violation of the Constitution.

It is a misnomer to call the act of 1867 an amendment of the charter of the Railroad Company. It affects no corporate right or franchise of the Company. Its more appropriate description would be "An act to enlarge the rights of one of the stockholders of the Company."

The judgment should be reversed and judgment entered for the defendants.

ALLEN, J.

By the act of 1851 (chap. 389) amending the charter of the city of Rochester, authority was given to the city as a municipal corporation, upon certain conditions, to contract for and become the owner of a limited number of shares of the capital stock of the Rochester and Genesee Valley Railroad Company, a private corporation organized under the general railroad act of 1850 (chap. 140). This was an enabling act giving to the city the right to make a contract and become an owner of property outside of the ordinary functions and necessities of the city government, and which but for the special power conferred, would have been *ultra vires* (*Thomson vs. Lee County, 2 Wallace, 327*). Capacity to act in this direction was conferred by the act. By it the city corporation acquired all the rights and powers of a natural person necessary to the exercise of the authority conferred, except as such rights and powers were limited and circumscribed by the act itself. Section 286 of the act declared that the city should, by the subscription, "acquire all the privileges, and be liable to the same responsibilities as other stockholders of said company, *except as hereinafter mentioned;"* and by § 290 it was provided that if the railroad company elected to receive the subscription, the city might nominate and appoint one director for every seventy-five thousand dollars of the capital stock of the company held by it, at the time of any election, but should have no voice in the election of the remaining directors.

Before the power, thus conferred, had been exercised, and a contract made and property acquired under it, the Legislature could have revoked the authority, or annexed to its exercise any limitations or restrictions that might have been deemed expedient. But after such exercise of authority, the question of Legislative power assumes a different form; and it becomes a question of some moment as to the right or constitutional power of the Legislature, under color of amending the charter of the city, to deprive the city of vested rights of property lawfully acquired, or to impair the obligations of contracts made with and affecting the rights and interests of others.

By the act of subscription to the stock and the assent and acceptance of the same a valid contract was made, by which one of the contracting parties parted or agreed to part with, and the other acquired title to, or agreed to purchase, certain shares of the capital stock of the railroad corporation. It was a valid contract, lawfully made, by parties competent to contract, upon a good consideration.

The contracting parties were free agents, under no compulsion or constraint, and free to make or refuse to make the contract, as their interests should dictate. The power conferred upon the city was for no public purpose, and no obligation to act was imposed upon the city authorities, and they could not have been compelled to subscribe for or purchase the stock.

One of the incidents of ownership of property is not only the *jus disponendi*, but the right to a voice in its control, management and use, and this right is valuable, and may be the subject of an agreement between joint owners of property, or the absolute owners and strangers. The general railroad act, under which the Rochester and Genesee Valley Railroad Company was organized, gave to shareholders in corporations formed in pursuance of its provisions, equal rights and a voice in the election of directors proportioned to their several interests.

By the act of 1851, this particular railroad company was permitted to issue stock to the city of Rochester, to which different rights and incidents should attach, and which should not be entitled to the statutory representation in the direction of the company. In a sense this was a modification of the organic law of the railroad corporation, because it gave permission, conferred capacity, to make in its discretion a single contract not authorized by the general laws of the land. But it did not alter the substance or vary the character of the transaction authorized. The contract, when made, was the act of two artificial persons, with all the powers, so far as this particular transaction was concerned, of natural persons, and these acts and contracts, within their respective capacities, have the same sanctions, and are equally sacred as the acts and contracts of natural persons.

The parties then, by their own act and consent, mutually agreed that the city of Rochester should take and receive from the railroad company three thousand shares of the capital stock of the latter corporation, for the price agreed to be paid, and as a part of the contract of purchase and of the considerations upon which it was made, the railroad corporation agreed that the city might at all times nominate and appoint a given number of the directors without the voice or assent of or let or hindrance from the other stockholders of the corporation. This was a valuable and important right surrendered to and acquired by the city. The city at the same time agreed that this stock should not, while held by it, have a voice or be represented in the election of the other directors of the company. This was a valuable and important right secured to the railroad corporation. The minds of the parties met in their assent to this agreement, and *non constat* that either would have entered into the transaction upon any other terms. The Legislature required the formal assent of the respective corporations to the contract, and when made, it was the act of the corporations, and not of the Legislature, who had no authority, and did not assume to make a contract for them. The city parted with its money, and the railroad company with its stock, and permitted the city to become a corporator upon these terms, and no others.

This contract, obligatory and binding upon the parties, because made by authority of law by persons competent to contract, is within the protection of the constitution of the United States, Art. 1, § 10, which prohibits a state from passing " any law impairing the obligation of contracts.."

The terms and conditions which attach to this stock were not conferred, and do not exist by force of law alone, but by the assent and agreement of the parties. The same act of 1851 gave authority to the city to issue bonds for the payment of money, and prescribed the form and tenor of the bonds; but the bonds, when issued, were the obligations of the city, the law only operating to give capacity to contract.

The law is only referred to as the source of power, and to ascertain to what extent these artificial bodies have the power and capacity to act. The Legislature can authorize the parties to make a new contract and to vary the terms of the first, but until the parties assent, the Legislature can have no power over it. The State has, it is true, reserved the right to dissolve any corporation formed under the general railroad act, or to amend the act (*Laws of 1850, chap. 140*, § *48*). It has not undertaken to exert the reserved power in respect to this corporation. By the constitution (*Art. 8*, § *1*) all general laws for the formation of corporations and all special acts creating corporations may be altered from time to time, or repealed. It is not necessary to consider in this case the provision of the constitution, or to enquire what are the limits, if any, to the power of the Legislature in the alteration of special charters, and to what extent they may by such alterations affect private rights and interests; or whether by special enactments, they can, without the assent of the corporation, deal with particular corporations organized under general laws. It is sufficient for the present purpose to say that whatever the boundaries of the reserved powers may be, they cannot be exercised to the extent of impairing the obligation of contracts lawfully made.

Commonwealth vs. Essex Company, 13 Gray, 239.

It is the right of each of the parties to the original contract to stand upon it as it was made, and to insist that no change shall be made without his assent.

Hamilton Mutual Ins. Co. vs. Hobart, 2 Gray, 543.

The act of 1867, authorizing the city of Rochester to appoint a greater number of directors than that agreed upon and assented to by the parties to the subscription and original contract, was in derogation of that contract and the rights of the parties under it, and did impair its obligations.

It is said that the corporators and stockholders of the railroad company became such with full knowledge of the reserved power of the Legislature. That is true; but they also had knowledge of the limits of Legislative power, and the restraints imposed by the constitution of the United States, for the guaranty and protection of contracts, and that the obligations of contracts were sacred and beyond the reach of Legislative action.

It is sought to distinguish between this contract and contracts made between corporations and third persons, on the ground that this was made with a stockholder, and had respect to the rights of stockholders *inter se*, and the internal management of the affairs of the corporation. But it was a contract authorized by law affecting property, not inconsistent with the general powers and obligations of the corporation, or in any respect affecting its relations to the public.

The rights and privileges of the contracting parties existed and were acquired by virtue of the contract and not from the act of the Legislature. A simple repeal of the act of 1851 would not vary the rights of the parties, for it could not have a retroactive effect to destroy the rights of parties acquired by a contract made pursuant to the act while in force.

It would neither cancel or annul the stock purchased by the city, nor avoid the bonds issued to pay for the same.

Butler vs. Palmer, 1 Hill, 324.
Sedgwick on Statutes, 133.
Fletcher vs. Peck, 6 Cranch, 87.

A retroactive effect would not have been given by a simple repeal, to the destruction of vested rights, or the impairing of the obligation of contracts. Property with all its incidents, and contracts with all their obligations, acquired and made under the act while in force, would have remained notwithstanding the repeal. It required something further that new rights and incidents should attach to property, and that the contracts affecting it should be modified and important terms and conditions alienated; and this was sought to be done by the direct action of the Legislature and without the assent of the contracting parties.

These were matters only affecting the relations and rights of individuals as between themselves, and which relations and rights had been settled by contract. Their alteration and modification in no respect affected the general powers and obligations of the corporation.

The power reserved to the Legislature over corporations, is over them as bodies and for public good, and not to regulate their internal dealings and management and the rights of corporators as between themselves. The rights of stockholders are individual rights acquired by contract, under authority of law, between each other or with the corporation; and what one has released to another by a valid contract cannot be restored by the Legislature under color of an amendment to the charter.

The power of the Legislature under the reserved right to alter, amend or repeal acts of incorporation, or the charters of private corporations, is without limit in the direction of changes affecting the general purposes for which the corporation was created, as by extending, restricting, or modifying and regulating the exercise of the general powers conferred. But the Legislature goes beyond the limits of the power thus reserved, when it undertakes to abrogate contracts made by authority conferred by the charter, or deprive the corporation of any propperty or rights of property lawfully acquired.

That the contract was made by the parties with full knowledge of the reserved right of the State to alter and amend the charters of each of the contracting corporations, is of no importance. Every contract is made with knowledge that the Legislature has the right to enact laws regulating the making of contracts and the rights of parties under them, but the existence of that power does not give the Legislature the power by *ex post facto* laws to affect or impair the obligation of contracts already made.

If the Legislature should provide by general law that all contracts thereafter made should be subject to and within the Legislative power, and might be impaired or amended by future laws, the constitution of the United States would nevertheless protect contracts made during the existence of such a law against the retrospective effect of any law undertaking in the exercise of such reserved power to impair their obligations. The laws of the State are not incorporated into contracts in the sense and to the extent of subjecting them to *ex post facto* laws in derogation of their terms and obligations.

Story on Const. Law, § § 1377, 1378.

Several cases were cited from the reports of the Supreme Court of the United States and the Courts of our sister States, bearing more or less directly upon the principal question presented upon this appeal. Among them are the cases of

Zabriskie vs. Hackensack and N. Y. R. R. Co., 3 C. E. Greene, 178.
Kenosha R. R. Co. vs. Marsh, 17 Wis. 13.
Hawthorne vs. Calef, 2 Wall., 10.
Lauman vs. Lebanon Valley R. R. Co., 30 Pa., 42.

They need not be referred to in detail.

The Courts distinguish between acts amending a charter, and which affect the whole corporation, and relate to its general purposes and powers and the mode and manner of carrying out such purposes and exerting such powers, and those which affect contracts made and vested rights acquired under the charter; and statutes which have attempted to impair the obligations of contracts, or destroy vested rights, have been regarded as *ultra vires*, and not within the reserved power of the Legislature.

My convictions are very decided, that the act of 1867 does impair the obligation of the contract by which the city of Rochester became a stockholder of the railroad company, so far as it assumes to vary the rights of the city and the other stockholders of the railroad company in the election of directors of the latter corporation, and is void, and that the judgment of the Supreme Court should be reversed, and judgment given for the defendants. If such a judgment could be given, I would adhere to give my voice in accordance with the views expressed, and for the reasons assigned. But by the constitution of this State the concurrence of four judges is required to a decision by this Court, and the Chief Judge being disqualified from taking part in the decision by reason of having been counsel for one of the parties to the litigation before his elevation to the bench, there are but six Judges competent to act, and they are equally divided in opinion; and except by way of compromise no judgment can be given. The question presented is of practical importance aside from its importance as one of legislative power under the constitution of the United States. That it is one of grave doubt and difficulty is evident.

The Judges of the Supreme Court were of opinion that the act of 1867 was a constitutional exercise of the reserved power of the Legislature, and gave judgment in accordance with that opinion. Upon the argument of this appeal in the late Court of Appeals, that Court was equally divided in opinion, and no judgment could be given, and this Court is upon a reargument here divided.

Notwithstanding my entire confidence in my opinion adverse to the judgment of the Supreme Court, I have no right to say that the question is not one of grave doubt. It ought to be decided, but cannot be authoritively decided here. Any judgment must be *pro forma*, and an affirmance of the judgment by this Court will enable the parties to bring error to the Supreme Court of the United States, where the rights of the parties and the constitutional question can be definitively settled.

Many cases are found in the books of an equal division of a Court composed of an even number of Judges, but none under circumstances which prevented a judgment. In *Rex vs. Corporation of Brecknock*, *8 Mod.*, *201*; and *Rex vs. Bennett*, *1 Stra.*, *101*, the twelve judges were equally divided, and the result was that no rule for a new trial could be granted.

In *Griffith vs. Harrison*, *4 Term. R.*, *737*, the Judges to whom a question was sent from chancery, were equally divided in their opinion as certified to the chancellor. *Laugher vs. Pointer*, *5 B. & C.*, *547*; *Norman vs. Booth*, *10 id.*, *703*; *Scoles vs. Jacob*, *3 Bing.*, *638*; *and Stratton vs. Barr*, *5 id.*, *136*; are instances of an equal division of the Court, in which rules for a new trial were either refused or discharged, and the party succeeding at *Nisi Prius* had judgment.

In *Green vs. Mills, 10 Cl. & F., 534*, upon an equal division in the House of Lords the judgment of the Court below was affirmed upon the application of the rule *semper presumitur pro negante.*

A mere withdrawal of one Judge would not enable this Court to give a judgment. There are precedents for such action of a Court, as will put a case of importance and doubt in such a position that it may be reviewed by a Court of dernier resort and the highest Court existing under the government. In *Stuart vs. Marquis of Bute, 11 Vesey, 657*, Lord Eldon said, "Upon the whole it is better for me to affirm the decree; not as being satisfied with the principle of it, but, as I cannot make a decree with which I should be better satisfied, that will put it into the course to go to the House of Lords." The decree was in part reversed by the House of Lords; and see *Beard vs. Westcott, 1 Turn. & R., 25.* In *Giles vs. Grover, 1 Young and J., 248*, Lord Lyndhurst affirmed a judgment that there might be an appeal to the House of Lords, where there was a difference of opinion between the Courts of King's Bench and Common Pleas and Exchequer, and the two Chief Justices were not able to agree in any decision of the question, the Lord Chancellor remarking, that although he had an opinion upon the subject, the best and most proper course was to dispose of it by affirming the judgment, in order that it might be finally decided by the Court of last resort.

In *Deane vs. Clayton, 7 Taunton, 489*, the Judges were equally divided, and Mr. Justice Burrough, in his opinion, says: "If I still find that the Court is divided on the question, thinking it as I do, a matter of great importance to the public, and to be a case which ought to be decided the one way or the other, I shall decline giving my judgment on this occasion, that the party may have the judgment of this Court reconsidered in another."

Chief J. Gibbs, who differed with Mr. Justice Burrough, announced at the close of his opinion, that, if the plaintiff thought fit to avail himself of the suggestion of his brother Burrough, judgment might be entered for the defendant, in order that the plaintiff might carry the matter further. The case appears to have gone no further, but is referred to in *Bird vs. Holbrook, 4 Bing., 628,* Park and Burrough reaffirming their opinions, and Best, Ch. J., inclining to their views. The Lord Chancellor in giving a *pro forma* judgment to facilitate a hearing in the House of Lords, said: "There have been many cases in Westminster Hall in which the Judges finding it expedient to send them to the House of Lords to be determined without delay, have considered their judgment to be merely the means of giving them that species of transit."

Earl of Belfast vs. Chichester, 2 J. and W. 439.

Without yielding my opinion or giving the assent of my judgment to the decree, I am of the opinion that under the circumstances it should be affirmed *pro forma*, to the end that the case may be taken to the Supreme Court of the United States for final decision.

The Court so ordered.

[*In the foregoing opinions Judge* PECKHAM *concurred; Judges* GROVER, FOLGER *and* ANDREWS *being for affirmance upon the merits.*]

[*Upon the first argument January, 1870, the following opinion was delivered by Judge* Foster, *in which Judges* Hunt, Lott *and* Sutherland *concurred.*

The Court consisted of eight Judges, of whom by the constitution (amended July, 1870) five must concur in any judgment. One Judge (Smith) *was disqualified to sit in the case. The other three* (Earl, Grover *and* Ingalls) *were for affirmance. Although, therefore, the vote was four to three, a re-argument was ordered before the new Court.*]

FOSTER, J.

Before considering the legal questions involved, it may be well to ascertain the precise state of things as they existed prior to and at the time the subscription of the city of Rochester was made to the stock of the Rochester & Genesee Valley Railroad Company.

The articles of association provided for the construction of a railroad from Rochester to Portage—an estimated distance of 50 miles—with a capital of $800,000.

The articles of association were dated the 7th day of June, 1851, and were signed by twenty-five persons as stockholders, with an aggregate subscription of $73,900.00, and in this condition they were filed in the office of the Secretary of State, on the 10th day of July, 1851.

In the meantime, and on the *3d day of July*, an act of the Legislature was passed "to amend an act entitled an act to amend and consolidate the several acts relating to the city of Rochester," which, upon certain conditions, authorized the city to raise money by the issue of bonds or otherwise, and to invest it in a subscription to stock in the aforesaid railroad corporation, to an amount not exceeding $300,000; and Section 290 declared that "the Common Council of the city of Rochester, in case the said 'The Rochester & Genesee Valley Railroad Company' elect to receive their subscription, should have power to nominate and appoint one director of said Company for every $75,000 of capital stock held by said city at the time of each election of directors of said company, but that said city should have no voice in the election of the remaining directors."

Afterwards, but at what time does not clearly appear, the subscriptions to the capital stock, exclusive of the subscription of the city of Rochester, amounted in the whole to $677,500; but it does appear that on the 15th day of June, 1852, the city of Rochester subscribed the sum of $300,000 toward the stock of the railroad corporation, and that on the same day "the Railroad Company, by resolution of its Board of Directors, *and in view of the terms and conditions of the act of 1851*, elected to receive the subscription."

In the end, the city paid in the whole sum of $300,000, and the whole stock held by others, and which was paid up in full, amounted to the sum of $255,200.00, and a large portion of the line of the road, as originally contemplated, was sold out to other companies, and only 18$\frac{3}{4}$ miles of the road were completed and used by the Company.

In 1867, the act of the Legislature, the validity of which is the main question here, was passed, and it purported to authorize the Common Council of the city of Rochester to nominate and appoint one director of the Railroad Company for every $42,855$\frac{5}{7}$ of stock held by the city at the time of each election of directors. In terms, it was an entire substitute for the 290th Section of the act of 1851, and did not contain any clause prohibiting the city from voting in the election of the other directors. It virtually gave to the city the election of seven directors out of the thirteen.

If this act of 1867 did not impair the obligation of a contract or deprive individual stockholders of vested rights, and thus become unconstitutional, the judgment below was right. If it did, the judgment should be reversed.

The only previous authority which can be claimed as directly in point to sustain the judgment, is the decision of the Supreme Court in *The People vs. Hills, 46 Barb., 340*, where the Court held that a statute, identical with that of 1867, except in its title, was constitutional; and which held also that the title of the act was sufficient. The case was appealed to this Court, and that judgment was reversed, upon the ground that the bill was a local one: that the subject of it was not expressed in the title; and that, therefore, the act was passed in violation of the constitution.

The counsel for the respondent cites *The Matter of Oliver Lee & Co.'s Bank, 21 N. Y., 9*, and *The Matter of the Reciprocity Bank, 22 N. Y., 9*, as analogous to the case before us. The first of these cases decided that Article 8, Section 7, of the Constitution of 1846, subjecting the stockholders of banks to personal liability, applied as well to banking corporations then existing, as to those created afterwards; that the provision contained in the banking law, reserving to the Legislature the power to alter or repeal it, formed a part of the contract with any association formed under it; that it might be modified prospectively or retrospectively; and that such change might be made by a change of the constitution, as well as by act of the Legislature. The other decided that it applied as well to stockholders of banks incorporated by special charters, and subject to the safety fund; and that it did not require a two-thirds vote, but might, under the constitution of 1846, be done by a majority vote. In each of these cases the Court declared what, upon principle, was undoubtedly the true rule in respect to them; and it did so with great unanimity. Unquestionably it was a part of the contract by which the banks accepted their charters, whether by special act or under the general banking law, that the Legislature might alter or repeal their charters; and the right to alter or repeal the act was expressly reserved by Section 209 of the act. And the Revised Statutes (*2 R. S., 5th ed., 597, sec. 8*) prescribed that "the charter of every corporation that shall hereafter be granted by the Legislature, shall be subject to alteration, suspension and repeal in the discretion of the Legislature." It would be idle to contend that where the right to alter, suspend or repeal had been reserved by the Legislature, such reserved power could not be exercised in the formation of a subsequent constitution of the State. And unless the act of 1867 can be assailed upon some better ground than that the Legislature had not the power to alter, suspend or repeal the charter of the city of Rochester, and of the Railroad Company also, the judgment must be affirmed.

But, certainly, all that those cases decide is, that such power can be exercised, and must be held to apply to corporations which were created under general laws, and may be exercised so as to make the stockholders liable personally, after the assets of the corporation are exhausted, for the payment of its debts.

Two other cases were cited here: *The Buffalo and N. Y. City Railroad Co. against Dudley, 14 N. Y., 336, and The Schenectady and Saratoga Plank Road Co. vs. Thatcher, 11 N. Y., 102.*

But these cases only declare that a stockholder shall be bound by his contract of subscription to the capital stock, although the condition of the corporation may have materially changed; and that where, after the incorporation of the Company and the subscription of the defendant to the stock, the Company, by a subsequent act of the Legislature, without his consent, increased its capital, and applied its funds to the construction of a branch road, not authorized by the original organization, the defendant was not thereby released from his subscription.

It is claimed for the appellants, that inasmuch as the charter of the Railroad Company was acquired under the general railroad act, in which there is no recognition of the right to alter charters of single Companies formed under it, that any alteration must be made in the general law, and apply equally to all the Companies so organized; and that there is no power in the Legislature to alter a single charter by legislative enactments; that the Legislature has not, in clear language, reserved such right; and that unless it is an inherent right (and upon the authorities cited in the notes to § 767 of *Angell and Ames on Corporations*, I think it is not), or unless by a fair construction of the statutes, charters created under general laws passed by the Legislature are "charters granted by the Legislature," and thus fall within the provision of the 8th section before cited, which makes them subject to legislative alteration, suspension or repeal; or unless the 28th section of the general railroad law, which prescribed that "any corporation formed under this act, shall, in addition to the powers conferred on corporations in the third title of the 18th chapter of the first part of the Revised Statutes, have power, &c. (of which the aforesaid Section 8 is a part), not only gives them the *powers* but subjects them to the *conditions of that title*; there is no power in the Legislature to pass laws altering the charters of such single corporations.

Of course, if the Legislature had no power to alter or affect the charter of the Railroad Company to any extent, by an enactment, the case of the plaintiffs fails. But although I am fully of the opinion that in some of the ways above stated, the power to alter, suspend or repeal, is reserved, I do not propose to discuss it, but to leave it upon the references made, and pass to the question whether, in any event, the Legislature could, without the consent of the Railroad Company, constitutionally pass the law of 1867. So much of the act of 1851 as allowed the city of Rochester to raise money, and subscribe to the stock of the Railroad Company, although it purported to be part of an act to amend the city charter, was in no good and proper sense a part of such instrument. Charters of cities and villages are granted to enable the inhabitants more easily and properly to control and manage all such matters as are local and relate to the good order, safety and well being of the inhabitants as such, within the bounds of such cities or villages; and amendments thereto are made, whenever deemed necessary or proper the better to carry out such local purposes.

But the sections of the act of 1851, referred to, are of an entirely different character; and if their purposes were carried out, would affect merely the *pecuniary interests* of the citizens, or of portions of them to be benefited in their business, or the enhancement of the value of their real estate by the construction and use of the road; but would have no concern whatever with the internal police, convenience or safety of the citizens, or with their municipal government.

It must be conceded that the Legislature may amend or alter a city charter, in anything which is properly a part of it, as municipal, at its pleasure; and may add to it such further municipal powers and duties as it pleases. When such alteration is made, the corporation may be compelled to obey its behests. But will it be contended that the Legislature had the power to compel the city of Rochester to subscribe and pay for $300,000 of the stock of the Railroad Company, upon the terms and conditions prescribed in the act, and without its consent?

It certainly did not do so, nor am I aware of an instance where the Legislature has attempted to exercise any such power; and it had no right to exercise it.

"To subscribe for railroad stock, or to purchase stock and become a member of a corporation and issue its bonds therefor, is not one of the general powers possessed by towns. Before a town can become bound by persons assuming to act as its officers for that purpose, the authority for such action must have been conferred by the Legislature, *and accepted by the town.* Such power may be conferred upon towns, and when conferred and accepted by a town, it may be exercised by officers or commissioners, as shall be specified in the act. But the acceptance by the town cannot be forced. A town cannot, by mere legislative enactment, be compelled to subscribe for the stock of a private corporation, or to issue its bonds in payment for such subscription, any more than an individual. The authority to grant the power and declare the mode of acceptance, is with the Legislature; but the option of acceptance is with the town" (*Town of Duanesburg vs. Jenkins, 46 Barb., 294*); and certainly such legislative power as the Legislature has not over towns, it cannot exercise over cities, villages or railroad corporations.

The act of 1851 was in no proper sense an amendment or alteration of the charter of the Railroad Company, nor did it purport, in any of its language, or in its enacting clause, to be so, and it could no more, by such an act, compel the Railroad Company to receive such subscription, and allow the city to become a stockholder on those terms, than it could transfer the whole franchise and the property of the corporation to the city, and it did not attempt to do so. And if it be claimed that the act of 1851 did, in any sense, alter or become a part of the city charter, and of the railroad charter, then, clearly, under the decision of this Court in the *People vs. Hills, supra*, the enactment was void, for it certainly was as much local as the act of 1865, in regard to it, was; and there was no mention or allusion, in the enacting clause, to the Railroad Company whatever. In my judgment it did not in any way, alter the charter of either corporation, but it allowed each of them to become parties to and to make a contract which their charter gave them no power to make. In *character*, it was precisely like the scores of acts which, for the last thirty years, have been from time to time passed to enable cities, incorporated villages and towns, in their corporate capacity, to subscribe, pay for and hold stock in Railroad Companies, leaving it optional, in all the cases, to the municipal and Railroad Companies to avail themselves of its provisions or not, as they chose, and declaring what their respective rights should be, if they made contracts pursuant thereto. And the main and only difference between those acts and this is, that the act of 1851 provided more definitely for the exercise of the powers of the city and of the other stockholders, as such, in the election of the thirteen directors which the general law provided for, than was the case in the multiplicity of the other kindred acts referred to, and those acts were not deemed by the Legislature to be alterations of either municipal or railroad charters; but merely as giving them the power to make contracts which, without such legislation, they could not make; and uniformly the question whether such subscriptions should be made was, as in this instance, to be submitted to the people, and required in most, if not all of them, as in this case, also, a preponderance in favor of it, of two-thirds, before the subscription could be made.

Now, could the Legislature by enactments professing to alter village, town or railroad charters, or all of them, change the pecuniary rights or the powers conferred by the statutes referred to upon them respectively, so as to place either of them in a better relation toward the others, than they had contracted for? And what would be said of a *statute* which should transfer the stock of the villages or towns, in such cases, to the other stockholders; or the stock of individual stockholders to the villages or towns; or that should give to either of them more votes in the management of the joint affairs and property of the corporation than they were entitled to by the terms of their subscriptions?

It is claimed for the respondents, that the Legislature has a right to limit the power of the stockholders in the management of the affairs of the corporation, by providing by law, after the corporation is created, for the appointment by the State, of one or more of its directors or managers.

It will be time enough to discuss that question when it becomes material to do so; but it is enough to say of it here, that the determination of it is not essential to a correct determination of the case before us. It may be that circumstances of such a character may arise that even such a power might be exercised by the State for the protection of the public; but it is quite unlike the case at bar. It would affect equally *in all respects* every one of the stockholders, and would affect the corporation only, and as a whole. It would not divest one class of stockholders either of the property which they owned as such, or diminish their power and control over it and give one or the other to other stockholders of the same corporation.

What would be thought of legislation that should declare by an amendment that a certain number of the stockholders of a corporation should own all the capital stock, or should cast all the votes, irrespective of the proportion of the whole stock belonging to them? And does it make any difference whether, as between them all, certain stockholders had a less number of votes than their *pro rata* share of stock might equitably call for? Or suppose a corporation, created by act of Legislature which should entitle small stockholders to cast a vote for each share of stock which they should subscribe for, and which should limit subscribers to above a certain amount, to one vote for every ten shares which they subscribed for; could the Legislature, after the subscriptions had been made and paid in, pass a valid law giving to each stockholder a vote on each share of his stock?

If the Legislature has the power to do so, it has it independent of any supposed equities between the stockholders which seem to call for it; for if it cannot pass such valid law when there are no equities calling for it, it cannot do so, be the equitable considerations ever so strong.

The Legislature has no judicial power, either legal or equitable. It has no authority to adjust or disturb the relations of individuals with each other, whether such relations are strictly private or whether the parties are stockholders of the same corporation. Its province is to declare what the rule of law shall be when different from the common law; and it is the duty of the Courts under such laws, to decide what the legal and equitable rights of individuals acquired in pursuance of such laws shall be. It is very clear that the Court could not, either at law or equity, change the relations of the individual stockholders and the city of Rochester towards each other, as fixed by the law of 1851, and their contract made thereunder; and if in such a case the Legislature can intervene and change them because the property to be disturbed by it is corporate property, the constitution will be no better than a rope of sand; for a very large proportion of the property of individuals is now invested in stocks of corporations. And to take from the stockholder the legal right to control his property invested in stock, which he had when he subscribed for it, is just as much impairing the obligation of a contract, as it would be to take the stock itself from him and give it to one or more of his associates. It will be recollected that when the law of 1851 was passed, only $73,900 of individual stock had been subscribed: and we must take into account therefore, the influence which the provisions of that act may have had upon the individual subscriptions which were received thereafter, as well as upon the corporate authorities and citizens of Rochester, and that both classes of subscribers knew what their relative rights would be under that law.

A law that impairs the right of one individual to such control of his property as he had when he acquired it, and which is important in securing it to him, as clearly impairs the obligation of the contract under which he acquired such right of control, as though it divested him of the property itself. "The objection to a law on the ground of its impairing the obligation of a contract, can never depend on the extent of the change which the law may make in it; any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation." (*Green vs. Biddle, 5 Condensed U. S. R., 370 ; and per Washington, J., page 386.*)

But for the adjustment of what seemed to be an inequality in the control of the railroad company, the act in question doubtless would never have been passed.

Neither the Legislature nor the Courts can take such considerations into account where they are called upon to act in reference to the rights of individuals or of corporations, whether arising upon questions between them and individuals who are not corporators, or as between the corporation and one or more of its stockholders.

And whether the case is a hard one or not, furnishes no reason why a Court should change it, unless it can be done consistently with the legal rights of the parties, or with the established rules in equity. And the Legislature has no right to interfere in either event.

When the contract was consummated under the act of 1851, all parties were aware of its provisions, and under that state of things the individual subscriptions had been increased to $677,500, and the city of Rochester subscribed to $300,000; and it is true that many of the individual subscribers to the stock failed to pay their installments, and the stock was reduced to $555,200.

But was it not the duty of all concerned to ascertain for themselves, before subscribing, what the probabilities in that respect were; and did not each of them agree to run all the hazards of such a contingency, and to determine for themselves also whether they would be able or whether it would be desirable for them to construct the whole line of road then in contemplation, and also whether in order to construct and operate the whole fifty miles, it might not require a large increase of the capital, and in so doing, give to the corporation of the city of Rochester the appointment of a larger number of directors under the act than their *pro rata* subscription toward the whole stock would, but for that act, entitle them to? And was it not also a fair subject of consideration, that the vote of the city for four directors would be cast as a unit, while the election of the residue would be subject to be affected by the different interests and views of all the other subscribers, who would not be likely to be so united in their votes?

We are bound to consider that all these and all other contingencies which might arise thereafter affecting the corporation, were taken into the account; and that upon such consideration, as well the individual as the corporate subscriptions were made. And there was just as much legal right for the Legislature, after the stock became so reduced, to relieve the remaining individuals from the further payment of calls, and under such altered condition of its affairs to pass "*An Act to amend its Charter*," the only provision of which should be, that the corporation should be prohibited from enforcing the payment of further installments, either by forfeiture of the shares or by action And I am not aware of a single principle of law which would prohibit such an act of the Legislature, any more than it would the one of 1867.

I have no doubt that the act of 1851 was not an amendment of the charter of the city or of the railroad company, but was merely an enabling act, authorizing the parties to contract; and that, as such, when fairly made, it was binding on all parties under all circumstances. But upon the supposition that it was an amendment of either or both of the charters, it was of such a character as vested legal rights in the stockholders individually as such, which could not be impaired by legislation without their consent, and that therefore the act of 1867 was void. There was no good reason for obtaining such legislation, unless the city was determined, at all events, and without regard to their pecuniary interests, to cast one solid vote for a majority of the directors and thus obtain the absolute and entire control of the road. For if experience proved that the majority of the directors elected pursuant to the act of 1851, were likely improperly to control and operate the road, and so as to be prejudicial to the interests of the city, it had only to sell out its stock, at private or public sale, in accordance with the power to do so conferred by the 289th section of the act of 1851, after which there would be no doubt that the vote or votes upon it would be equal, share for share, with the other individual stock. For it is only while the stock remains the property of the city, that the restriction to appoint only four directors continues.

I think the judgment of the Court below should be reversed.

SUPREME COURT

OF THE UNITED STATES.

CHARLES G. MILLER AND OTHERS
Plaintiffs in error.
vs.
THE PEOPLE OF THE STATE OF NEW YORK,
Defendants in error.

Brief and Points for Defendants in Error.

STATEMENT OF FACTS.

This was an action in the nature of a writ of *quo warranto*, brought by the Attorney General of the State of New York against the plaintiffs in error, who were alleged to have usurped the office of directors of the Rochester and Genesee Valley Railroad. The Supreme Court of the State of New York decided that the plaintiffs in error had illegally usurped such office. This judgment was affirmed on appeal by the Court of Appeals, and a writ of error was brought by the defendants in the court below to this court.

The only question involved is the constitutionality of Chapter 59 of the Laws of 1867, passed by the Legislature of the State of New York.

If that act is constitutional the decision of the State Court was correct, and should be affirmed. If the act was a violation of the Constitution of the United States, the decision was erroneous and should be reversed.

By an act amending the charter of the City of Rochester, passsed July 3, 1851, (Laws 1851, p. 767), the Common Council were authorized to borrow upon the faith and credit of the city, the sum of three hundred thousand dollars to be invested in the stock of the Rochester and Genesee Valley Railroad Company, and employed in the construction of the railroad and appurtenances, and for no other purposes whatever.

By virtue of the subscription thus authorized, the city was declared to acquire all the rights and privileges and be liable to the same responsibilities as other stockholders of said company, except as otherwise provided in the act.

In case the railroad company elected to receive the subscription, the Common Council were authorized to nominate and appoint one director for every seventy-five thousand dollars of capital stock held by the city at the time of each election of directors, but the city could have no voice in the election of the remaining directors.

On the 10th of July, 1851, the articles of association of the Rochester and Genesee Valley Railroad were filed in the office of the Secretary of State, organizing a corporation under the General Railroad Act of 1850, (Record, p. 16).

This corporation was created for the purpose of constructing, owning and maintaining a railroad from the city of Rochester to the town of Portage, a distance of fifty miles, with a capital stock of eight hundred thousand dollars, divided into eight thousand shares of one hundred dollars each, (Id. p. 14.)

On the 15th day of June, 1852, the Mayor of Rochester, properly authorized by the Common Council, subscribed for three thousand shares of the capital stock of said company, and, on the same day, at a meeting of the directors of the railroad such subscription was unanimously accepted, (Record, p. 14).

Other parties subscribed for stock to the amount of $677,500, so that the whole amount subscribed, including the stock taken by the city, was $977,500.

The whole amount of capital stock fully paid up was as follows:

By the city of Rochester, - - -	$300,000
By all other parties, - - - -	255,200
Total amount, - - -	$555,200

The balance of the stock subscribed was extinguished or forfeited before the act of March 9, 1867, (Id. p. 13.)

Before this time also the Rochester and Genesee Valley Railroad Company had abandoned the construction of their road south of Avon, and assigned all their rights and franchises beyond that point to another corporation, (Id. p. 16.)

On the 9th of May, 1867. (Laws 1867, p. 92,) an act was passed, amending the act of 1851 by giving the Common Council authority to appoint one director for every 42,855 5-7 of stock owned by the city. In other words establishing the same ratio that existed among the subscribers for stock at the time the original subscription was made. The effect of this act was to give the city of Rochester power to appoint seven of the thirteen directors, and the other stockholders six.

At the annual election, held on the eleventh of June, the stockholders, other than the city, disregarding the act of 1867, proceeded to elect the plaintiffs in error directors, (p. 18.) On the same day the Common Council, in pursuance of the act of 1867, appointed seven directors, (p 16.)

The court held that the election of the plaintiffs in error was irregular, and that the appointment by the Common Council was valid, (p. 13.)

We here copy such portions of the Constitution and Statutes of the State of New York as are deemed material.

Section 1, Article 8 of the Constitution of the State of New York, adopted 1846, is as follows:

Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes and in cases where, in the judgment of the Legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.

By chapter 140, session laws of the State of New York 1850, p. 211, the general act for the formation of railroad companies was adopted. It is entitled "An act to authorize the formation of railroad corporations, and to regulate the same."

The following are some of the sections:

§ 1. Any number of persons, not less than twenty-five, may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, or for the purpose of maintaining and operating any unincorported railroad already constructed, for the like public use, and for that purpose may make and sign articles of association in which shall be stated the name of the company; the number of years the same is to continue; the places from and to which the road is to be constructed, or maintained and operated, the length of such road as near as may be, and the name of each county in this State through or into which it is made, or intended to be made; the amount of the capital stock of the company, which shall not be less than ten thousand dollars for every mile of road constructed, or proposed to be constructed, and the number of shares of which said capital stock shall consist and the names and places of residences of thirteen directors of the company, who shall manage its affairs for the first year, and until others are chosen in their places.

Each subscriber to such articles of association shall subscribe thereto his name, place of residence and the number of shares of stock he agrees to take in said company. On compliance with the provisions of the next section, such articles of association may be filed in the office of the Secretary of State, who shall endorse thereon the day they are filed, and record the same in a book to be provided by him for that purpose, and thereupon the persons who have so subscribed such articles of association; and all persons who shall become stockholders in such company, shall be a corporation by the name specified in such articles of association, and shall possess the powers and privileges granted to corporations, and be subject to the provisions contained in title three of chapter eighteen of the first part of the Revised Statutes, except the provisions contained in the seventh section of said title, (section 8, title 3, chap. 18, p. 601, fol. 1, of the Revised Statutes passed in 1828 here referred to is as follows:

(§ 8. The charter of every corporation that shall hereafter be granted by the Legislature, shall be subject to alteration, suspension and repeal, in the discretion of the Legislature.)

§ 5. There shall be a board of thirteen directors of every corporation formed under this act, to manage its affairs. Said directors shall be chosen annually, by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue to be directors until others are elected in their places. In the election of directors each stockholder shall be entitled to one vote for each share of stock held by him. Vacancies in the Board of Directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation.—Every corporation formed under this act shall be subject to the regulations concerning the election of directors of moneyed corporations, contained in article second of the second title of the eighteenth chapter of the first part of the Revised Statutes. The inspectors of the first election of directors shall be appointed by the Board of Directors named in the Articles of Association.

No person shall be a director, unless he shall be a stockholder, owning stock absolutely in his own right, and qualified to vote for directors at the election at which he shall be chosen. At every election of directors the books and papers of such company shall be exhibited to the meeting, provided a majority of the stockholders present shall require it.

§ 7. The directors may require the subscribers to the capital stock of the company to pay the amount by them respectively subscribed, in such manner and in such installments as they may deem proper. If any stockholder shall neglect to pay any installment as required by a resolution of the Board of Directors, the said board shall be authorized to declare his stock and all previous payments thereon, forfeited for the use of the company; but they shall not declare it so forfeited until they shall have caused a notice in writing to be served on him personally, or by depositing the same in the post office, properly directed to him at the post office nearest his usual place of residence, stating that he is required to make such payment at the time and place specified in said notice, and if he fails to make the same his stock and all previous payments thereon, will be forfeited for the use of the company, which notice shall be served as aforesaid, at least sixty days previous to the day on which such payment is required to be made.

§ 47. If any corporation formed under this act shall not, within two years after its Articles of Association are filed and recorded in the office of the Secretary of State, begin the construction of its road, and expend thereon ten per cent. on the amount of its capital or shall not finish the road and put it in operation in five years from the time of filing its Articles of Association as aforesaid, its corporated existence and powers shall cease.

§ 48. The Legislature may at any time annul or dissolve any incorporation formed under this act; but such dissolution shall not take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred.

By chapter 262, session laws of the State of New York, 1850, p. 501, the charter of the city of Rochester was amended and consolidated.

The act is entitled "An act to amend and consolidate the several acts relating to the city of Rochester."

It consists of 284 sections, the last of which is as follows:

§ 284. This act shall be deemed a public act, and the Legislature may at any time repeal, modify or alter the same.

By chapter 389, session laws of 1851, p. 757, said act was amended. This act is entitled "An act to amend an act entitled an act to amend and consolidate the several acts relating to the city of Rochester." It embraces thirty-three sections. The concluding sections are as follows:

§ 285. It shall be lawful for the Common Council of the city of Rochester to borrow on the faith and credit of said city any sum of money not exceeding three hundred thousand dollars, for a term not exceeding twenty years, at a rate of interest not exceeding seven per cent. per annum, and to execute bonds therefor under their corporate seal and the signature of the Mayor or such other officer as the Common Council may designate. The bonds so to executed may be in such sums, and payable at such places and times, not exceeding twenty years, and in such form as the Common Council may deem expedient.

§ 286. The Common Council of said city may dispose of such bonds to such persons or corporation, and upon such terms as they shall deem most advantageous to the city, but not for less than par, and the money which shall be so raised shall be invested in the stock of the Rochester and Genesee Valley Railroad Company, and employed and used in the construction of the said railroad, its buildings and necessary appurtenances, and for no other purposes whatever; and for that purpose the said Common Council in the corporate name of said city, may subscribe for or purchase stock of the said company to the amount of the said sum of three hundred thousand dollars; and by virtue of the said subscription or purchase of said stock, and upon receiving certificates or the transfer of certificates for the amount of said stock so subscribed for, or purchased by them, the said city shall acquire all the rights and privileges, and be liable to the same responsibilities as other stockholders of said company, except as hereinafter mentioned.

§ 287. The dividends arising from the said stock so to be subscribed for, or purchased by said city, or so much thereof as may be necessary, shall be applied by the Common Council to the payment of the interest which shall from time to time accrue upon the bonds authorized to be issued by this act; and in case such dividends shall not be sufficient in any one or more years to pay the interest accruing on said bonds, it shall be and is hereby made the duty of the Common Council of said city, and they are hereby authorized to cause to be assessed and levied and collected upon the real estate and personal of said city, at the same time and in the same manner as other contingent expenses of the said city are assessed, levied and collected, such sum or sums of money as may be necessary to make good such deficiency and apply the same to the payment of such interest, which sum shall be determined upon by the Common Council of said city and entered on their minutes.

§ 288. It shall be lawful for the said Common Council to loan any of the incorporated banks in this State during the time allowed by law for constructing said road, any portion of the sum hereby authorized to be borrowed, which may not be immediately wanted for the payment of the stock so to be subscribed for, or purchased by them, or in the construction of said road.

§ 289. The Common Council of said city may at any time after acquiring said capital stock, exchange the same in whole or in part for the city bonds issued under the authority of this act, and in such case they shall cancel the bonds so received by them; or they may dispose of such stock in their discretion to any purchaser or purchasers for cash, but shall not sell and dispose of the same at less than par, except at public sale, of which twenty days' notice shall be given in at least two of the daily newspapers published in the city of Rochester, and in case of a sale of said stock, the proceeds thereof shall be applied by said Common Council to the purchase or redemption of the bonds authorized to be issued by this act, and to no other purpose whatever.

§ 290. The Common Council of city of Rochester, in case the said "the Rochester and Genesee Valley Railroad Company" elect to receive their subscription, shall have power to nominate and appoint one director of said company for every seventy-five thousand dollars of capital stock held by said city at the time of each election of directors of said company, but said city shall have no voice in the election of the remaining directors.

§ 291. The preceding sections two hundred and eighty-five, two hundred and eighty-six, two hundred and eighty-seven, two hundred and eighty-eight, two hundred and eighty-nine, and two hundred and ninety of this act, together with this section, shall not take effect until they shall have been submitted to the electors of the city of Rochester qualified to vote at an election for charter officers of said city, at a special election which shall be held in said city, at such time as the Common Council shall direct, of which ten days' previous notice shall be given by an advertisement, to be inserted in all the daily newspapers published in said city, for the purpose of determining whether or not it is expedient for said city to borrow the money mentioned in said sections for the purposes therein specified; which election shall in all respects be conducted in the same manner as the charter elections in said city, and the laws respecting such elections and the persons voting and offering to vote thereat, shall be applied to it. The inspector shall provide a box in which each elector qualified to vote as aforesaid may deposit a ballot, on which shall be written or printed the words "For the railroad," or the words "Against the railroad." Those ballots on which shall be written or printed the words "for the railroad" shall be deemed to approve said sections, and those upon which shall be written or printed the words "against the railroad," shall be deemed as not approving it. The said box shall be kept open for the reception of votes in each of the wards of said city, from nine o'clock in the morning to seven o'clock in the afternoon of the day of election; and the inspectors in each of said wards shall canvass the votes deposited in said box, in the same manner as is now required by law in the election of charter officers by ballot, and within two days after such canvass, shall certify and return to the clerk of the Common Council of said city the aggregate number of votes taken, designating how many were in favor or "for the railroad," and how many "against" it. The Mayor and clerk of the Common Council of the said city shall thereupon immediately proceed to canvass the votes thus certified and returned, and shall make and file in the office of the clerk of the Common Council their certificate that the said sections are approved or are not approved, as the case may be, by the votes of two-thirds of the electors of said city voting at such election, and said sections shall be published in at least two of the daily papers in the city of Rochester for one week previous to said election.

§ 292. If the said sections 285, 286, 287, 288, 289, 290, 291 shall be approved by two-thirds of the votes of the electors of said city and voting at such election as above prescribed, then the same shall take effect immediately after the filing of the certificate of such approval of the said act by the said Mayor and clerk of the said Common Council.

§ 293. This act shall take effect immediately.

ACTS OF 1867—CHAP. 59.

AN ACT to amend section 290 of chapter 389 of the laws of 1851, relating to the election of directors for the Rochester and Genesee Valley Railroad Company by the Common Council of the city of Rochester. Passed March 9, 1867.

§ 1. The people of the State of New York represented in Senate and Assembly, do enact as follows:

The Common Council of the city of Rochester shall have the power to nominate and appoint one director of the Rochester and Genesee Valley Railroad Company for every forty-two thousand eight hundred and fifty-five dollars and five-sevenths of a dollar of capital stock of the said railroad company held by the said city at the time of each election of directors of said company.

§2. This act shall take effect immediately.

POINTS.

I.

It is claimed by the plaintiff in error that a contract was entered into between the city of Rochester and the Genesee Valley Railroad Company, or the subscribers for its stock, fixing the number of directors which each class of subscribers should elect.

> The parties had no power to make any such contract. A necessary element of such a contract would be the right to fix the whole number of directors.
>
> A contract that one party should have a certain number of directors and the other party the balance would be idle, unless the whole number were fixed. If one party was to have four directors, and the whole number might be fixed at six or sixteen, at the pleasure of another party, outside of the contract, it is plain that the proportionate number could not be established by the contract.
>
> Now, in this case, the number of directors is fixed by the Legislature, (§ 5, railroad act). No corporation or individual has the power to change the number.

The Legislature have that power, and may at any time make the number seven or twenty or any other number at pleasure.

By section 290 of the act of 1851, the Legislature gave the city of Rochester power to elect one director for every $75,000 of stock owned by it at the time of any election of directors. By the above section of the railroad act the number of directors was then fixed at thirteen.

Subsequently the city of Rochester subscribed for $300,000 of the stock. That would entitle her by the statute to four directors and the other stockholders to nine. It is now claimed that the parties had power to contract that this arrangement should never be changed. We submit that it was not left to the parties to make any such arrangement. The arrangement was made and completed by the acts of the Legislature from which both parties derived all their power. The Legislature fixed the number of directors, the manner of election, and the proportion which each class of subscribers should elect. Nothing was left for the parties to do in this respect. They could not re-enact the statute and make it perpetual by inserting it in a contract.

In Sherman vs. Smith, 1 Black 592, the parties had inserted a portion of the statute in the articles of association. This court say: "We can discover no authority in the section, or any necessity or propriety on the part of the association for incorporating the law itself into their articles. Certainly in doing so, they cannot change it or make it more or less effectual." * * * "This article of association therefore, being a mere attempt to re-enact a provision of the law, and this even without any authority, cannot be regarded as a contract in any legal sense of the term. and of course not within the protection of the provision of the constitution of the United."

In the present case it seems to us there is nothing to justify a corporation in making the claim that it has power to contract with its own members in regard to regulations which the Legislature has itself particularly established, and thus place those regulations beyond the control of the Legislature itself. Can there be any doubt of the power of the Legisture to amend §5 of the railroad act so as to make the number of directors seven, instead of thirteen? If not, it seems entirely clear that the particular number of directors that one class or another of stockholders should have, was beyond the power of contract by private parties. They might, with equal propriety, contract that no other law passed by the Legislature should ever be changed. The same statute provides that every stockholder shall have one vote for every share of stock. Did the company contract with every stockholder that that part of the section should never be changed? Is not the right of one stockholder just as much a matter of contract as another? And is not that a matter of no contract whatever, but the proper subject of legislation?

In *Butler vs. Pennsylvania*, 10 How. 416, this court say: "The contracts designed to be protected by the tenth section of the first article of that insrtument (the constitution) are contracts by which *perfect rights, certain, definite, fixed private rights* of property are vested."

II.

The parties did not in fact make any such contract or assume to make it. The contract was simply the ordinary one of subscription [See Record, page 18].

The city of Rochester merely subscribed for three hundred thousand dollars of stock, and the railroad company accepted the subscription. No terms, conditions or limitations of any kind were imposed or agreed upon.

There was no express contract whatever between the parties in regard to directors, or elections, or the vote of stockholders. No allusion was made to the subject in the contract. No attempt has been made either to change or confirm or perpetuate the provisions of the statute.

The contract which the plaintiffs in error have assumed to exist, is only a creature of the imagination.

III.

The terms of the contract can only be implied from the law itself.

The strongest view that can be taken for the plaintiffs in error is that the statute became a part of the contract, and can therefore be referred to as defining and establishing the terms and conditions. But when the statute is thus referred to as entering into the contract, all the provisions of the statute are to be taken together. The sections reserving to the Legislature the right to alter, amend or repeal became a part of the contract. Here, then, is an agreement by all parties that the Legislature may do exactly as it has done. The right to repeal or change becomes a part of the contract just as much as any other part of the statute. That is the express doctrine of this court in Sherman vs. Smith supra. The court say: "The 32d section which reserved to the Legislature the power to alter or repeal the act, by necessary construction reserved the power to alter or repeal *all or any one of these terms and conditions*, or rules of liability prescribed in the act. The articles of association are dependant upon and become a part of the law under which the bank was organized, and subject to alteration or repeal, the same as any other part of the general system."

See also

Buffalo and N. Y. City Railroad Co. vs. Dudley, 14 N. Y., 248, 354.

Schenectady and Saratoga Plankroad Co. vs. Thatcher, 11. N. Y., 103.

In the matter of Oliver Lee & Co.'s Bank, 21 N. Y., 15.

The plaintiffs in error contend for the very reverse of that doctrine. They contend that the law is dependant on the contract, and that the agreement of the parties is of greater authority than the law which authorized the agreement. It must be carefully borne in mind that the Genesee Valley Railroad Company was not in existence when the act of 1851 was passed. That act was passed July 3, 1851. The articles of association were filed July 10, 1851, (See record p. 16). At that time the corporation was formed under all the laws which then existed.

The plaintiffs in error have assumed that the act of 1851 was simply an enabling act, giving two corporations then in existence power to enter into a contract. On the contrary the railroad company was formed after the passage of that act, and accepted its charter subject to all the provisions thereof, including the power of alteration or repeal.

IV.

Assuming that the law entered into the agreement as it existed July 10, 1851, when the railroad corporation was formed, and June 15, 1852, when the subscription was made, what were the terms of the contract?

1. That every subscriber should pay his subscription, (Railroad act, § 7).

2. That there should be a board of thirteen directors, (Id. § 5).

3. That each stockholder should be entitled to one vote for each share of stock held by him, (Id.)

4. That the city of Rochester should subscribe and pay $300,000, (Record p. 16).

5. That the other parties should subscribe and pay $677,500, (Id.)

6. That the city of Rochester should have the right to elect one director for every $75,000 of stock (act of 1851, § 290), making four directors for the stock subscribed.

7. That the other subscribers should have the right to elect one director for every $75,000 of stock subscribed by them, thus giving them nine directors for their subscription of $677,500.

8. That the Legislature might at any time change the provisions of the act.

V.

What were the obligations of this contract?

In Sturgis vs. Crouningshield, 4 Wheaton, 415, Ch. J. Marshall defines the obligation of a contract as follows:

> "A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is of course the obligation of a contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation."

Within this definition the obligations of the contract in 1852 were

First, That the subscribers should pay their subscriptions as called for by the directors; and

Second, That on such payment they should have all the rights of stockholders as defined by the law.

The payment was the first and principal obligation. Without that no subscriber could gain the rights of a stockholder. On payment all these rights followed.

If the subscription had been paid all the conditions of the contract might have been fulfilled. Every share of stock would have been equally represented. The city would have elected one director for every $75,000 of stock, and the other subscribers would have elected one director for every $75,000 of stock.

VI.

What was the obligation of the contract in 1867, when the amended act was passed?

The city had paid her subscription in full and received certificates for $300,000 of stock.

The other subscribers, represented by the plaintiffs in error, had failed to pay. Out of $677,500 subscribed by them. only $255,200 were paid, leaving a deficiency of $422,300 unpaid, and this amount of their stock was forfeited and extinguished, (See Record, p. 16).

The plaintiffs in error claim that by the obligation of this contract, having paid only $255,200 out of $677,500, they are entitled to as many votes and to elect as many directors as though they had paid the full sum. That they, as defaulters, have the same rights as they would have had if they had paid in full; that while by the contract they could only have nine directors for $677,500 of stock, yet by the same contract they are entitled to nine directors for one-third of that amount; that while by the contract they were entitled to one director for every $75,000 of stock, yet by the same terms they are entitled to one director for every $28,355 of stock; that while by the contract a majority of stock elected a majority of directors, yet by the same contract a minority has the right to elect nine directors, while the majority can only elect four.

VII.

We submit that no such obligation as this can ever be adjudged to exist in any implied contract.

The provision that the city of Rochester should have one director for every $75,000 of stock was upon the condition that all parties should pay their subscriptions. The right to vote depended on both sides upon the question of payment. If the city paid nothing she could have no vote; if she paid $75,000 she would be entitled to one director, and so on. If the plaintiffs in error paid the $677,500 which they subscribed they would be entitled to nine directors. If they paid nothing they would have no vote. If they paid a part of their subsubscription, they should have directors or votes in exactly the same proportion. If the question depends at all on contract, this would be the obligation of the contract. It would be equality; more than that no court of justice could enforce. Equality was implied in every condition of the contract, and expressed in all the provisions of the statute. No party pretended to stipulate for anything beyond.

VIII.

We have endeavored to show that every obligation of the contract rested on perfect equality. A vital obligation of the contract is to enforce equality.

A statute which recognizes the obligations of a contract, and gives a remedy according to the terms and spirit of it, does not impair the obligation of the contract, but affords the proper means to fulfill. It gives the same relief that courts would give if they possessed the power.

> A remedial statute which fully recognizes and protects the rights of all parties is not unconstitutional.
>
> Dartmouth College vs. Woodward, 4 Wheat. 518.

The statute of 1867 is precisely of this character.

In consequence of the failure of the plaintiffs in error to comply, their subscription was reduced from $677,500 to $255,200. This with the subscription of the city of $300,000 left the total subscription in 1867 at $555,200, instead of $977,500 as it was in 1852 (See Record, p. 16). The number of directors remaining thirteen that would give one give one director for a trifle less than forty-two thousand eight hundred and fifty-five dollars.

This statute then simply re-established the equality which existed when the subscription was made, and which was lost by the failure of the plaintiffs in error to pay their subscription. The statute at the time of the subscription gave each class of subscribers one director for every $75,000, the whole subscription being $977,500.

The statute of 1867 gave each class of subscriscribers one director for every $42,855 4-7, the proportion in both cases being precisely the same when the subscription was reduced to $555,200.

If the Legislature in this case exercized judicial functions, the law would not be objectionable on that account.

Satterlee vs. Matthewson, 2 Peters, 380. In all remedial statutes these functions are exercised.

That exact justice was done to all parties concerned no one can dispute.

IX.

In order to declare the act of 1867 unconstitutional, this court, acting judicially upon the facts of the case, must be able to see that the legal or equitable rights of some party, existing at the time of the passage of the act, have been impaired or affected. If no right which could be established or enforced in ony court of justice has been taken away or affected, then the law is not unconstitutional. In the foregoing propositions we have endeavored to show that the statute in question viewed in any aspect, is entirely free from any objection, even without considering the power reserved of the legislature.

X.

There is still another answer to any right of the plaintiffs in error to complain of the statute, which, we respectfully insist, is conclusive.

By section 47 of the general railroad act, under the provisions of which the Genesee Valley railroad Co. was formed, every corporation formed under that act is required to finish its road in five years from the time of filing its articles of association, or its corporate existence shall cease, (Laws 1850, chap. 140, §47).

By the articles of association of this corporation the railroad was to be constructed from Rochester to Portage, a distance of fifty miles, (Record, p. 15.) In fact they never completed the road. They abandoned the construction of their road south of Avon, and only completed 18¾ miles, instead of fifty, (Record, p. 16). This abandonment was long prior to the act of 1867. So that then the corporate existence of the company had ceased. It existed only by sufferance.

The AttorneyGeneral might have wound up its affairs at any time. The Legislature alone could give it life. By the act of 1867 the Legislature recognized the existing condition of affairs, and impliedly permitted the corporation to continue under the terms of that act. The corporation did continue to exercise its corporate functions (Record, p. 12), and thus accepted the act.

Without that act it has no legal corporate existence. It can raise no voice as a corporation against the Legislature. It is legally dead. If it claims the benefit of that act as recognizing its existence, it must take the statute as it is, with all its terms and conditions.

The King vs. Passmore, 3 T. R., 200.

XI.

Again: of the stock subscribed $422,300 was forfeited. This forfeited stock, with all prior payments, inured to the benefit of the corporation, (Railroad act, §7). The corporation held this fund in trust for the stockholders. Equity would apportion this ratably among the stockholders.

The Legislature had the power beyond question to authorize the corporation to issue certificates of stock for the amount thus forfeited, and distribute them among the existing stockholders proportionately. It would be substantially a stock dividend. Had this been done, the same thing would have been accomplished which was effected by the act of 1867. This equitable distribution of stock would have placed all parties upon the footing of the original transaction.

In every phase of this case, the power of the Legislature in different ways is apparent, and its exercise in some way was imperatively demanded.

XII.

An additional well settled principle of law may be referred to, in itself sufficient to sustain the act of 1867.

> By the charter of the Genesee Valley Railroad Company, granted in 1851, that corporation, as has been stated, was empowered to construct a road from Rochester to Portage within five years with a capital of $800,000. The corporation did not regularly execute the power conferred.
>
> It irregularly reduced the road from fifty to eighteen miles. It failed in a large measure to keep up either its stock or the road.
>
> Legislation here became proper, and necessary within the case of Thompson vs. Lee County, 3 Wallacé, 327. It was held in that case that if the Legislature possess the power to authorize an act to be done, it can by a retroactive act cure the evils which existed, because the power thus conferred has been irregularly executed.
>
> That decision rests on principles absolutely essential to the permanent prosperity of a State.

XIII.

In the case of *Butler vs. Pennsylvania* 10 How 415, his Hon. MR. JUSTICE DANIEL, in delivering the unanimous opinion of the court, says: "It has been repeatedly said by this Court, that to pronounce a law of one of the sovereign States of this Union to be a violation of the constitution, is a solemn function, demanding the gravest and most deliberate consideration; and that a law of one of the States should never be so denominated if it can on any other principle be correctly explained. Indeed it would seem that if there could be any course of proceeding more thon all others calculated to excite dissatisfaction, or to awaken a natural jealousy on the part of the States and to estrange them from the federal government, it would be the practice for slight and insufficient causes of calling on those States to justify before tribunals in some sense foreign to themselves, their acts of general legislation."

It is not improper, we trust, to close this case with a reflection upon these words of moderation and wisdom. The law of this case is not for one State but for all the States. It is not for to-day only, but for future generations. The business performed by corporations and the capital invested in them at the present time is almost incalculable. They have qualities which best conform to the spirit of the age, and commend them to all classes of the people.

In one shape or another the whole community have a deep and increasing interest. Under a wise management, with a reasonable supervision, the existing confidence will not diminish. But take away that just legislative control which can fairly meet every unforeseen contingency that may arise, and give such relief as equity would dictate, and the consequences are disastrous. Public confidence which rests in a great measure upon the existence of legislative power, would be impaired. Capitalists would not invest in corporations if factious minorities may control all business affairs, and defy the Legislature itself.

While corporations would have diminished conconfidence, they would also have diminished powers.

The broad, general and liberal charters which public policy now dictates, if these are to be used as a power against the State, will be no longer granted, and limits and restrictions alike injurious to the corporations and the public, which only self-protection could justify, will be imposed. Liberal charters and legislative supervision must from necessity go hand in hand. Destroy the one and the other cannot exist. Public confidence in the Legislatures cannot abate because they must always represent the people of the States. In their wisdom and their justice it will be always safe to rely, for when these fail, the government itself can no longer stand.

XIV.

The judgment of the Court of Appeals, of the State of New York, should be affirmed.

James C. Cochrane,
For Defendants in Error.

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2 Lord Raymond 938 &c

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